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86-1158

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1986

Conrad Schellong,
Petitioner,

v.

U. S. Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

1. Whether the binding application of collateral estoppel is proper from denaturalization decisions to a deportation decision?

2. Whether the binding application of collateral estoppel is proper from the denaturalization decisions based upon concealment or willful misrepresentation in connection with either the visa application or the naturalization application where the Seventh Circuit in reviewing the holding of denaturalization expressed its reluctant to uphold the trial court's finding on the visa issue which is relevant here, under the circumstances of this particular case?

3. Whether the undisputed findings of Schellong's duties as an outside guard at Sachsenburg, where the evidence shows such duties were limited to thirty-six occasions in 1936, and his duties for part of 1937 to 1939 involved the training of recruits some of whom may have subsequently served as outside guards before the war, are sufficient to constitute assistance in persecution because of race, religion, nationality or political opinion, 8 U.S.C. Section 1215(a)(19), under Fedorenko v. United States, 449 U.S. 490 (1981)?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

Article I Section 9

. . .

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

. . .

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

A. Deportation

[persecution]
8 USC Sec. 1251(a)(19)

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

- (A) the Nazi government of Germany,
- (B) any government in any area occupied by the military forces of the Nazi government of Germany,
- (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
- (D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

[fraud or willfully misrepresenting a material fact]
8 USC Sec. 1251

General classes of deportable aliens
(a) General classes. Any alien in the United States ... shall, upon order of the Attorney General, be deported who --

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

8 USC Sec 1182(19)

Excludable aliens. [classes]

(19) Any alien who . . . has procured a visa . . . by fraud, or by willfully misrepresenting a material fact;

B. Waiver

8 USC Sec. 1251(f)

(f) Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry. (1)(A) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or have procured visas or other documentation, or entry into the United States, by fraud or misrepresentation, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in subsection (a)(19) who

(i) is the spouse, parent or child of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (14), (20), and (21) of section 212(a) [8 USCS Sec.

1182(14), (20), (21)] which were a direct result of that fraud or misrepresentation.

(B) A waiver of deportation for fraud or misrepresentation granted under subparagraph (A) shall also operate to waive deportation based on the grounds of inadmissibility at entry described under subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

C. Suspension of Deportation

8 USC Sec. 1254(a) eff. 12/29/81

(a) Adjustment of status for permanent residence; contents. As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(19) [8 USCS Sec. 1251(a)(19)] who applies to the Attorney General for suspension of deportation and --

D. Proceedings to determine deportability; removal expenses.

8 USC Sec. 1252 (b)

. . . Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, . . .

Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. such regulations shall include requirement that --

(1) the alien shall be given notice ...
(2) the alien shall have the privilege of being represented ...
(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

E. Denaturalization

8 USC Sec. 1451. Revocation of naturalization

(a) Concealment of material evidence; refusal to testify. It shall be the duty of the United States Attorneys . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitted such person to citizenship . . . on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . .

F. Termination of Social Security Benefits

42 USC Sec. 402(n)

(n) Termination of benefits upon deportation of primary beneficiary. (1) If any individual is (after the date of enactment of his subsection [September. 1, 1954]) deported under paragraph (1),(2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act [8 USCS Sec. 1251(a)], then, notwithstanding any other provisions of this title--

(A) no monthly benefit under this section or section 223 [42 USCS Sec. 423] shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence. Section 203(b), (c), and (d) of this Act [42 USCS Sec. 403(b), (c), (d) shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241(a) of the Immigration and Nationality Act [8 USCS Sec. 1251(a)] enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Conrad Schellong, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 15, 1986 and the denial of his Petition for Rehearing entered on November 14, 1986.

OPINIONS BELOW

Two causes of action and four decisions are relevant to this matter due to the use of collateral estoppel from the denaturalization decision to the

the decision of deportation. In connection with the matter now directly under review the Seventh Circuit's "Corrected" opinion is App. A. The Board of Immigration Appeals decision is not published as a precedent decision and is reproduced as App. B. The denaturalization decision of the Seventh Circuit is published at 717 F.2d 329 (1983), cert denied, 104 S.Ct. 1002 (1984) and is App. C. The district court's opinion is published at 547 F.Supp. 569 (N.D. Ill. 1982) and is App. D.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 15, 1986. (App. E). Rehearing was denied on November 14, 1986. (App. F). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of the Constitution and statutes are reproduced in a preceding portion of this Petition.

STATEMENT OF THE CASE

Petitioner, Conrad Schellong, is a German emigre who came to the United States in 1957 and achieved American citizenship in 1962. In 1981 the Government filed an action seeking denaturalization.

The denaturalization suit was litigated on the issues of whether or not Mr. Schellong either concealed or willfully misrepresented material facts in either the visa application process or the naturalization process. [8 USC 1451(a)]. It was on one or more of those four grounds that Mr. Schellong was denaturalized.

Deportation was ordered solely upon application of collateral estoppel with the Government (OSI) electing to stake there case solely on collateral estoppel without offering new or additional evidence on two grounds: 1. Willful misrepresentation on the visa application [resulting in the seizure of Schellong's earned social security benefits upon deportation (42 USC 402(n)), but upon which ground Schellong is eligible for suspension or waiver of deportation]. 2. Assistance in persecution [(8 USC 1251(a) not resulting in seizure of Schellong's earned social security benefits, but resulting in his ineligibility for suspension or waiver of deportation (8 USC 1254(a)]. This constitutes a worst case finding which results in his expulsion without the possibility of discretionary relief and seizure, without compensation, of his means of subsistence.

He is ordered deported to West (Federal Republic) Germany; however, he renounced his German citizenship to obtain naturalized American citizenship. He is a man without a country and West Germany need not accept him. Since deportation under the Holtzman Amendment will be to any country regardless of whether or not the deportee will be subject to persecution, it is a foreseeable possibility that the Soviet Union will be the only place that will offer to accept him. Since Schellong earned the highest decorations for bravery in battle against the Soviet Union, the United States would be in the peculiar position of sending a soldier who fought bravely against our present enemy into their hands. It has never been suggested that Schellong is a war criminal or ever committed any wrongful acts against another human being. The imposition of a death sentence is not so far fetched. Mr. Fedorenko of Fedorenko v. United States, 449 U.S. 490 (1981), has been recently sentenced to death by the Soviet Union following his deportation there. Mr. Linnas of United States v. Linnas, 790 F.2d 1024 (2nd Cir. 1986), was sentenced to death by the Soviet Union in absentia before deportation was brought against him by our Government.

Discovery proceeded in the denaturalization case with government depositions taken in California and Germany of former prisoners held at Dachau (Finsterwalder, Gans, Bettleheim, Roeder, and Gattinger) and a former officer at Dachau (Zeitler). Neither Petitioner nor his attorney attended these depositions due to lack of funds and the fact that assistance in persecution was not in issue. Each of these depositions was taken before the effective date of the amendment to 8 USC Sec. 1254(a) [eff. 12/29/81] that for the first time made Mr. Schellong ineligible for suspension of deportation in the event he should lose his citizenship and then be found deportable upon the basis of the Holtzman Amendment, (assistance in persecution) 8 USC Sec. 1251(a)(19). Both the denaturalization trial court and the circuit court did not rule on the question of "persecution" since it does not constitute a ground for denaturalization. Each court noted, however, there was no evidence implicating Schellong in any incident of prisoner abuse.

The trial court apparently held against Schellong on all four bases in the denaturalization case -- concealment and willful misrepresentation on both the visa and naturalization papers. It is the issue of willful misrepresentation on the visa application in the denaturalization trial, but not concealment on the visa application, nor willful misrepresentation nor concealment on the naturalization papers, that is identical to a test for deportation in the present litigation. The circuit court's denaturalization decision commented on the evidence in connection with the visa:

> "If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation. The testimony of government witness L. Donald Junior, a former consular official, indicates that the visa application itself was very limited in space; the applicant's answers would be expanded on the supplemental questionnaire which was also required and in the face-to-face interview. Yet no supplemental questionnaire was introduced into evidence in this case, and this Court can only hypothesize as to whether or not Schellong was asked about his Waffen SS service, as the government claims he must have been, and whether or not he clarified or expanded his answer. For all we know at this point, Schellong might have entered "Waffen SS" as a form of shorthand for his residences, fully intending to clarify the answer if given the opportunity to do so." 717 F.2d at 333.

The sole alleged instance of either a concealment or willful misrepresentation in connection with the visa application is on the application itself and only in connection with the answer to question 26 which requested places of previous residence. ". . . 1934-1939, German Waffen SS . . ."

However, the circuit court contrary to the strong inference arising from its own decision that the government's evidence was insufficient to carry its case on either concealment or willful misrepresentation on the visa issue, held in the subsequent deportation case that it meant to say that Schellong had concealed his residence and willfully misrepresented a material fact by the use of "'Waffen SS' as form of shorthand". This "holding" rejected from consideration the new evidence Schellong had presented at the deportation hearing which established, without rebuttal, that the term "Waffen SS" was commonly used to refer to Schellong's units of the 1930s before and at the time of submission of the application to the visa authorities. Never did the Government present any evidence that the term "Waffen SS" was not in common use in Germany to refer to Schellong's prewar units -- never. The Government expert testified that the first official use was in 1939 or 1940. When asked directly whether it was used informally, he avoided an answer to that question. He admitted he had seen scattered uses of the term in official reports during the war referring to Schellong's prewar duty as with the Waffen SS.

The question of assistance in persecution, that was not decided and not in issue in the denaturalization case, was decided against Schellong in the deportation case on the basis of collateral estoppel and solely on its erroneous reading of this Court's decision in Fedorenko. This finding enabled both the Board of Immigration Appeals and the Seventh Circuit to ignore Schellong's new evidence contesting the weight of government evidence that the prewar camps were places of persecution; the weight of government evidence that prisoners were held solely due to race, religion, national origin, or political opinion; Schellong's lack of assistance in persecution and his lack of knowledge of persecution and his very limited guard duty. The substantial basis in evidence of a finding of persecution was the use of the video taped depositions taken in California and Germany without cross-examination -- taken at a time when assistance in "persecution" was not in issue -- before the denaturalization trial and before Congress declared Schellong ineligible for suspension of deportation if he was found to have assisted in persecution.

Neither ground for deportation was established by lawful nor by substantial evidence to support a finding by the standard of clear and convincing evidence as required for an order of deportation. The findings of the Board of Immigration Appeals and the Seventh Circuit were all based only on the doctrine of collateral estoppel without any consideration of Schellong's new evidence which had been admitted at the deportation trial and has never been struck from consideration.

REASONS FOR GRANTING THE WRIT

1. COLLATERAL ESTOPPEL IS NOT APPLICABLE IN DEPORTATION CASES

The circuit court decision in this case creates a conflict between the 7th and the 9th Circuits. The use of collateral estoppel is not warranted in deportation cases. Title v. INS, 322 F.2d 21 (9th Cir. 1963). That case is on point and holds that preclusion thwarts the intention of Congress:

> "We do not feel that the doctrine of collateral estoppel should have been applied ... Its application had the effect of depriving petitioner of the hearing guaranteed him by section 242 of the Immigration and Nationality Act of 1952 [8 USC Section 1252(b)]. ... As a result of his denaturalization in 1955, petitioner became an alien and as such was subject to the deportation laws. To hold, however, that the hearing he received at the time of his denaturalization takes the place of the hearing procedure provided for in section 242 would, we think, clearly thwart the intention of Congress." At page 24.

Section 242 provides "the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government." At the deportation hearing now under review, contrary to the holding in Title, the Government merely offered into evidence most of the record of the denaturalization case and no new evidence. This offer included the uncross-examined depositions taken before eligibility for suspension from deportation was barred, a time when "persecution" was not in issue. Schellong had no opportunity at the deportation hearing to cross-examine the distant witnesses whose testimony was important to the "persecution" determination. In the denaturalization trial the Seventh Circuit, in refusing to remand that case, emphasized "the district court did not rely on the depositions to any great extent in its fact-finding." United States v. Schellong, 717 F.2d 329, 335 (1983). The sole purpose of these depositions is in connection with persecution, not a willful misrepresentation. These depositions were the "substantial" evidence employed in the deportation matter to support a finding of persecution. The Seventh Circuit in its review of the deportation matter failed to find little or no reliance of these depositions. The evidence that Schellong presented in the deportation case was not considered for any purpose by either the Board of Immigration Appeals or the Seventh Circuit. This situation is equivalent to the Title case where no defense evidence was permitted and no cross-examination was available. In Title there had been a change in law due to an intervening Supreme Court decision. Here there was no reason for Schellong to cross-examine before the denaturalization trial since persecution was not in issue and that evidence did not bear on the issue of willful misrepresentation or concealment. In addition, the subsequent bar to suspension increased the severity of the consequences to Schellong. The sole case cited against Title was a not for publication decision of the Sixth Circuit, United States v. Demjanjuk, No. 85-3198, which failed to consider the Title issue in any respect. See also, Ghanbari v. INS, 683 F.2d 571 (1st Cir. 1982).

2. COLLATERAL ESTOPPEL IS NOT APPLICABLE TO THE VISA APPLICATION ISSUE DUE TO THE CIRCUMSTANCES OF THIS PARTICULAR CASE

Denaturalization could rest on any on four possible grounds: 1. Concealment on the visa application. 2. Willful misrepresentation on the visa application. 3. Concealment on the naturalization petition. 4. Willful misrepresentation on the naturalization application. 8 USC Section 1451(a). The district court found against Schellong on all four possible issues.

Deportation is authorized if a visa is procured "by fraud, or by willfully misrepresenting a material fact" in connection with the visa application, not in the naturalization process. 8 USC Section 1182(a)(19).

The Seventh Circuit was restrictive in its finding. Although it affirmed: " . . . the district court did not err in finding willful misrepresentation or concealment," 717 F2d at 334, the Seventh Circuit stated: "If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation." 717 F2d at 333.

The circuit court opinion states the "clear" basis of its decision -- misrepresentation or concealment on the naturalization papers. After that holding it states that the district court did not err in finding a concealment or misrepresentation -- in the disjunctive, not the conjunctive. The Seventh Circuit did not state that Schellong had willfully misrepresented in his visa application -- it was unnecessary to make that decision in that case since it had found against Schellong on the "clear" basis of the naturalization papers. Objectively, the Seventh Circuit did not decide the issue against Schellong and the subjective musings of the Seventh Circuit in its deportation decision do not constitute its finding in the denaturalization case. The Seventh Circuit refers back to the finding of misrepresentation on the naturalization papers and impliedly finds a years long scheme "attempting to mislead government authorities to gain entrance to the United States." But neither the district nor the appeals court made such a finding in the denaturalization case -- the circuit court has created findings where there were none.

The sole alleged instance of either a concealment or willful misrepresentation in connection with the visa application is on the application itself and only in connection with the portion of his answer within the [ ] below to question 26 which requested places of previous residence. Schellong answered:

> "Birth -- 1911, Dresden, Germany; 1911-1934, Leipzig, Germany; [1934-1939, German Waffen SS]; 1939-1945, Waffen SS during the war, . . . " (APP. A4).

The sole evidence relevant to this issue of misrepresentation was by Sydnor who testified there was no organization named "Waffen SS" until late 1939. But when Sydnor was asked whether the term "Waffen SS was commonly applied to Schellong's prewar duties, Sydnor evaded an answer to that question and merely reaffirmed that its first official use was in 1939.

Schellong's explanation was simple, straightforward, correct and reasonable. The term

"Waffen SS" was common usage in 1956 as applied to his units of 1934-1939. Mrs. Schellong corroborated this testimony. This evidence was ignored by the district court. The circuit court commented by summarizing this evidence and mentioned the official SS 1940 evaluation of Schellong that refers to his joining the "Waffen SS" in 1934. The circuit court concluded: "The district court gave little weight to this evidence" as well it must since it was not mentioned in its decision.

Government witness L. Donald Junior who had handled the tough cases of visa applications in post war Germany testified he found little to question about the use of "Waffen SS" in the shorthand used on the visa application in answer to question 26. The space there was very limited and a supplemental questionnaire would be the standard method of the visa authorities to expand on any shorthand answers. The supplemental questionnaire was not produced nor was its absence explained. Considering all of this evidence the circuit court expressed its reluctance to affirm denaturalization on the visa application issue.

At the deportation hearing Schellong presented more evidence that compels the conclusion that the term "Waffen SS" was in fact common usage to refer to Schellong's prewar duties. D Sch Ex C is a 1942 official German SS document. It had been mistranslated by the government at the denaturalization hearing and was offered with a correct translation by Schellong at the deportation hearing. The official document designates Schellong's prewar service as "Waffen SS" service: " . . . posts held after appointment as SS-Officer of the 'Waffen SS' were as Company commander 1937-1938 and as Battalion Adjutant in 1938-1939." The government had omitted the terms "of the 'Waffen SS'" insuring the document they offered into evidence would not corroborate Schellong's defense -- this is a second instance [besides the 1940 document referred to by the circuit court] of official German documents generated in the 1940s employing the same vocabulary as Mr. Schellong did in 1956. Further it was pointed out that former prisoner Roeder in his deposition used the term "Waffen SS" to refer to troop training units at Dachau in the 1930s -- Schellong was a commander of just such a unit. The single most compelling new evidence is the 1945 official interrogation of Zeitler another deposition witness. The British authorities took his statement in 1945 and reduced it to writing. This official document calls Zeitler's assignment to the same regiment at Dachau at the same time as Schellong, "Waffen SS" service -- the exact usage of Schellong in his 1956 visa application that has been mistakenly condemned. Never has the government produced any evidence to rebut the fact that Schellong's use of the term "Waffen SS" was not proper common usage.

". . . [T]here is considerable truth in the observation that res judicata renders white black, the crooked straight. ... Rigidity in applying legal principles ... is undesirable." United States v. LaFatch, 565 F.2d 81 (1977). Here the denaturalization case was decided on all alternative grounds by the trial court. But the Seventh Circuit's statement of reluctance to uphold the findings of the trial court on the question of concealment or willful misrepresentation on the visa application negates an inference of "clear and convincing evidence" as does "not leave the issue in doubt on any element of the case." Schneiderman v. U.S., 320 US 118, 87 L.Ed. 1776, 63 S.Ct. (1943) and Woodby v. INS, 385 US 276, 17 L.Ed. 2d 362, 87 S.Ct. 483. This issue is not subject to preclusion.

> "Where a case is decided alternatively by a trial court on several issues, but is disposed of on appeal on only one of these issues, only the issue considered by the appellate court is concluded. Plastic Container Corp. v. Continental Plastics of Oklahoma, (CA10th, 1979) 607 F.2d 885, cert denied (1980) 444 US 1018; Stebbins v. Keystone Ins. Co., (CA DC, 1973) 481 F.2d 501; Martin v. Henley (CA9th, 1971) 452 F.2d 295, 300. Other cases are collected in Hicks v. Quaker Oats Co. (CA5th, 1981) 662 F.2d 1159, 1168, n6." 1 B J Moore, J Lucas and T. Currier, Moore's Federal Practice, Section 0.443[5.-2] (2d ed 1984), at fn 2 bottom of page 790.

Since Schellong's use of the term "Waffen SS" was in harmony with the accepted common usage as proved by the testimony of Schellong, his wife and the prisoner Roeder and was regularly employed in all official documents in evidence both by the Germans themselves and by the British authorities, there was no misrepresentation at all. The order of deportation for willful misrepresentation on the visa application is a grave injustice.

3. DEPORTATION ON THE BASIS OF ASSISTANCE IN PERSECUTION IS ERROR

"Persecution" was not a ground for denaturalization, however, collateral estoppel was applied to that issue in the deportation case. The evidence at the denaturalization hearing that bears most directly on the persecution issue is from the uncross-examined depositions taken before the bar to suspension and, of course, before persecution was in issue. This evidence was relevant to the issue of materiality in the denaturalization case. However, materiality and persecution do not contain identical elements. Further, considering the second prong of the Chaunt test of materiality -- "possibly leading to the discovery of other facts warranting denial of citizenship" [Chaunt v. United States, 364 U.S. 350, 355] -- a contest by Schellong of the materiality issue in denaturalization would have been a futile waste of resources he did not have. Schellong filed an affidavit of indigence in the district court.

The Seventh Circuit concisely stated what it decided:

> "...[W]e must decide whether Schellong's service as a Nazi concentration camp guard alone is assistance 'in the persecution of any person for purposes of Section 1251(a)(19)." (APP. A12).

It supported its affirmation of that question:

> "Schellong does not dispute that he served as a concentration camp guard at Sachsenburg and trained and supervised guards at Dachau. It is that critical fact, conclusively established in the denaturalization proceeding, which may not be relitigated in the deportation proceedings by virtue of collateral estoppel." (APP. A13).

Schellong agrees he acted as an outside guard commander at Sachsenburg on thirty six occasions in 1936 at a time it held from one to eighteen Jews. He agrees he was assigned to Dachau from 1936 to 1939 in various capacities in none of which he dealt directly with prisoners nor did any man when under his command. During this period he was assigned to guard a building in Stuttgart, sent to Sonthofen, sent to Czechoslovakia, sent to Austria, assigned to take winter mountain and ski training, to train a group for parades, to act as battalion adjutant for a troop battalion, to act as a troop supply officer and to act as Company Commander of recruit companies.

It is agreed that his unit of recruits at Dachau may have been designated as reserves during their basic training since they were confined to the barracks, however, no emergency arose and they never performed guard duty. Also, some of the trainees may have been assigned to guard duty at some camp following their transfer from training and before the war. There is not a scintilla of evidence that Schellong "supervised guards at Dachau." The OSI expert, Sydnor was asked to list Schellong's duties at Sachsenburg. He testified that he had acted as a guard there. He was then asked to list Schellong's duties at Dachau. Sydnor did not testify Schellong's duties included acting as a guard or as a guard supervisor.

But, based upon the Seventh Circuit's expansive interpretation of Fedorenko, as a per se ground for deportation of anyone under any circumstances who ever performed any guard duty at any German Concentration Camp, these differences would not matter.

The Seventh Circuit employed much the same erroneous reasoning in United States v. Kairys, 782 F.2d 1374 (7th Cir. 1986), cert. den., 106 S. Ct. 2258. The position was not advanced in either the circuit court or in the Petition for Certiorari that the differences between the Kairys service and station were distinguishable from Fedorenko. The position is here advanced that the differences between the setting and duties of Fedorenko and Schellong require the opposite result.

The following differences are significant:

Fedorenko

Schellong

Treblinka	Sachsenburg
Death Camp	Labor Camp
Prisoners Jews	Inmates Criminals
No facilities for prisoners	Good food, paid work, and care
Guards ordered to kill prisoners	Guards to report misconduct
Guards knew of Mass murder	Guards knew of labor
Guards knew inmates held solely as Jews	Guards knew inmates held for crimes

The Holtzman Amendment was intended to apply to those who meet the standards of Nuremberg as war criminals:

> "... [T]he Immigration and Naturalization Service does have knowledge of two cases in which substantiated allegations of Nazi war atrocities have been received ... [I]f H.R. 12509 is enacted ... these aliens would be rendered deportable." See, US Code Congressional and Administrative News, Vol. 4, 95th Congress, Second Session, 1978 at page 4702.

Congresswoman Holtzman in introducing the bill stated its target:

> "[T]he presence of Nazi war criminals in the United States constitutes the unfinished business of World War II." 124 Cong. Rec. H10731, Sep. 26, 1978.

Court have interpreted that Amendment in this way:

> "[T]he legislative record as a whole evinces only an intent to exclude from the United States those person who committed crimes against humanity in the name of Nazism. [citing house report] Congress' goals in passing the Holtzman amendment appear to have been the need to 'put our government squarely on record as denying sanctuary in the United States to Nazi War Criminals.'" Slip opinion at p. 13 of Linnas v. INS, (2d Cir., May 6, 1986) docket No. 85-4163., 790 F.2d 1024.

The Seventh Circuit's quote from the Nuremberg Trials (APP A15) is misleading by omitting the portion of the paragraph directly following:

> "To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter ... .]" 6 FRD at page 131.

Moral choice, the Nuremberg test, [6 FRD p. 111] requires both knowledge that such conduct is forbidden and knowledge the conduct is evil -- perhaps malum in se. Acts before 1939 had not been forbidden by prior laws declaring crimes against Humanity [6 FRD p. 130] and without such a standard one may not be held culpable. Of course, no one has so such as suggested that Mr. Schellong was involved in killing or torture. At Sachsenburg there is only one incident established by the evidence of a killing. At that time the Government agrees Schellong was not present at the camp, and the evidence indicated the internal guards, the separate and distinct Commandant's Staff who ran the prison were culpable, not the outside guards.

Schellong did not know that Sachsenburg or Dachau were places of persecution. His view was similar to the view of a prison guard in America. The American guard believes the prisoners are imprisoned. He believes they committed crimes and are dangerous. He believes there is nothing wrong with prisoners working on chain gangs -- certainly not in the 1930s. He may not know that it is acceptable in Delaware to inflict twenty lashes for a crime. Delaware v. Cannon, 55 Del 587 and 597 (1963). He may not know United States prisons presently hold three times the number of prisoners on a per capita basis than Germany did in its prewar camps at their zenith which included ordinary German criminals. [D Sch Ex B; D Sch 136; D Sch D].

Schellong was informed by monthly official circulars that the prisoners "had transgressed the law of our nation." GX-B19 page 11. As Nuremberg found: "[I]ndependent judgment, based on freedom of thought, was rendered quite impossible." 6 FRD, p. 83. Nor was prisoner abuse authorized. GX-B19, an official circular states a box in the ear is full scale mistreatment and is forbidden. The government's own expert, Sydnor, agrees that abuse was forbidden. He also testified there was no systematic extermination. Former prisoner Jacoby testified there were no gas chambers and no crematory at either Sachsenburg or Dachau. There was insufficient notice to Schellong to support a finding of knowledge of persecution by clear and convincing evidence.

Kristallnacht appeared to be a spontaneous uprising of violence by the German people against the Jews. A German diplomat had been murdered by a Jew and this formed the somewhat plausible pretext for secret official persecution. The orders for the pogrom are clearly marked secret and in keeping with any secret information was not available -- particularly in a state without the possibility of independent judgment. The orders marked secret are D Sch Ex N. Schellong was totally unaware of these orders and mistakenly believed the Jews in need of protection from mob violence. But the number held was quickly reduced. Gans arrested at about that time and placed into Dachau was release within one month. He did not deny he may have been held for his own protection. This was a distant uncross-examined deposition taken by OSI before the denaturalization case where they chose the questions for the purpose of making their subsequent case for deportation against the indigent Schellong.

The prisoner markings are unique. But homosexual acts were a crime as they are presently in several of the United States. [GX-B16]. Jehovah Witnesses were arrested not for their beliefs, not for expressing their beliefs, but solely for refusal to perform alternate service such as with the air raid defense service. [D Sch Ex J]. All of the prisoner witnesses who testified on the uncross-examined depositions at distant places who described their markings indicated they worn "red" as a designation of a political prisoner. However, three of them were imprisoned for treason, one admitted to more common crimes, and none of them testified they were innocent of all wrongdoing except Mr. Gans who was release in one month.

The former prisoner, Jacoby, testified, under cross-examination, the conditions at Sachsenburg and then Dachau were good except for corporal punishment for alleged infractions of prison rules -- food excellent, work reasonable, medical care provided and the prisoners paid. He was imprisoned for criminal acts: illegal border crossings and escape from another camp. He said the conditions became much worse following the start of WWII when Schellong had been transferred to the front.

In the Brief of Petitioner of one Reinhold Kulle, another case involving a concentration camp guard, Seventh Circuit, No. 86 - 1277, a challenge was made to OSI, the same agency representing the government here:

> "After a review of many cases in the Trial of the Major War Criminals at Nuremberg and many cases of persons tried for war crimes and crimes against Humanity under the authority of the United Nations War Crimes Commission, no member of the guard unit was so much as charged, let alone convicted, of crimes against Humanity for mere membership in the guard unit. Each person charged, no matter what his or her capacity, was accused of individual acts of active personal participation involving murder, beatings or torture; or of being in the direct line of command over those who performed such acts." Page 47 of that Brief.

In its answering brief in the Kulle case, OSI failed to meet this challenge. It failed because the statement is true.

A leading case presented by the United States to the United Nations War Crimes Commission in Nuremberg is Erhard Milch, Law Reports of Trials of War Criminals, Vol. VII, pp 27-66, (1947). The court found the controlling legal questions:

1. Were low-pressure and freezing experiments carried on at [wartime] Dachau?
2. Were they of a character to inflict torture and death on the subjects? (The answer to these two questions may be said to involve the establishment of the corpus delicti.)
3. Did the defendant personally participate in them?
4. Were they conducted under his direction or command?
5. Were they conducted with prior knowledge on his part that they might be excessive or inhuman?
6. Did he have the power or opportunity to prevent or stop them?
7. If so, did he fail to act, thereby becoming particeps criminis and accessory to them?

In the leading case of Josef Kramer and 44 others (Belsen Trial), Law Reports of Trial of War Criminals, United Nations War Crimes Commission, his Majesty's Stationery Office, London, England, Vol II, 1945 rules of law were forged in connection with the trial of concentration camp personnel immediately following the war. The lessons of history and the ruling of Nuremberg were fresh and legally admissible evidence was fresh and even available to defendants to show their lack of culpability -- which is not possible now. The trial involved both the Belsen and Auschwitz camps. The distinction between the conditions of the two camps (there Belsen and Auschwitz; here prewar camps and war time death camps) was expressly considered.

"...most of the offences were committed against superior orders, and the gas chamber offenses, the only exception, were not committed without a knowledge that they were wrongful ... Kramer, supra, page 3.

> "In regard to the more general question of ill-treatment or maltreatment, . . . it was not claimed that such treatment was in any way authorized by the German Reich, as it has been suggested might be the case in regard to the gas chambers." Kramer, supra, page 117 - Statement of Judge Advocate.

> "[T]here was no charge against Dr. Klein of any deliberate acts of cruelty, and it was for the court to consider whether Klein had a fair opportunity to do anything with regard to the conditions at Belsen and whether he failed to act..." Kramer, supra, page 120.

> ". . . mere presence on the staff (of a concentration camp) was not of itself enough to justify a conviction." Kramer, supra, page 120.

In 1945 after interviewing thousands of inmates and guards, the allied prosecutors and courts convened under the authority of the United Nations were satisfied that "mere presence on the staff was not of itself enough" and the only exception to offenses being committed contrary to the laws of Germany were the "gas chamber" offenses which of necessity were committed with "knowledge that they were wrongful" -- "knowledge" is an essential element as is moral choice. It follows that if acts of ill-treatment are proved, it is essential to prove personal commission or "a fair opportunity to do anything with regard to the conditions ... [and one] failed to act." Mr. Schellong did not have a "fair opportunity" to remedy any ill-conditions, nor did he contribute to such conditions. OSI admits there is no evidence he ever abused a prisoner nor implicating any man under his command.

This Court employed the terms "concentration camp" and "death camp" interchangeably:

> "Petitioner [Fedorenko] took the stand in his own behalf. He admitted his service as an armed guard at Treblinka and that he had known that thousands of Jewish inmates were being murdered there." . . . Petitioner admitted, however, that he had followed orders and shot in the general direction of escaping inmates during the August 1943 uprising ..." 449 U.S. at 500.

Fedorenko's knowledge of mass murder of thousands of Jews solely because they were Jews is a precondition necessary to a finding of criminality for participation in crimes against humanity, without direct involvement in acts of brutality, as required by the Milch and Belsen trials. Further, the fact he shot in the general direction of escaping prisoners may meet the requirements of a personal act of brutality required for a finding of participation without actual knowledge of mass murder.

As one Jenkins testified in Fedorenko:

> "Q If through investigation or interview you had determined that [a visa] applicant in fact did serve at a death camp ... in occupied Poland as a Ukrainian Guard would you have denied the visa application?
>
> "A Yes, I would." At 449 U.S., page 510, f.n. 31.

The Supreme Court employed the same meaning as the Congressionally authorized report -- Personal Justice Denied [D Sch EX A] that distinguished the camps in which we held 120,000 of our Japanese citizens and aliens in 1942 -- the term "concentration camps" now means the "death camps" of Europe.

The Seventh Circuit further states:

> "Insofar as these cases [Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), and United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985)] hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DPA or the Holtzman Amendment, they conflict with Fedorenko, 449 U.S. at 512 n.34. See 750 F.2d at 1432 and 763 F.2d at 122-123." (APP. A 13,14).

The decisions criticized by the circuit court -- Laipenieks and Sprogis echo the principles of the War Crime Trials. It was held necessary to prove active personal acts of brutality. It was necessary to prove that Laipenieks in arresting all kinds of Communists did so solely on the basis of race, religion, national origin or political opinion. It was necessary to show that Sprogis who paid the bounty to farmers for turning in Jews he jailed was an instance of persecution contemplated by the Holtzman Amendment. There was a failure of proof in each of those cases. OSI did not dispute these findings by a request for Certiorari. The decision sought to be reviewed stands absolutely alone and contrary to the law of Nuremberg, the law of the United Nations war crimes trials and the Second and Ninth Circuits as well as contrary to the Supreme Court's decision in Fedorenko.

CONCLUSION

For the foregoing reasons, petitioner, Conrad Schellong, respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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CORRECTED

In the
United States Court of Appeals
For the Seventh Circuit

No. 85-2430

Conrad Schellong,
Petitioner,

v.
U. S. Immigration and Naturalization Service,
Respondent.

Petition for Review of Order of
the Board of Immigration Appeals

Argued April 11, 1986 - Decided October 15, 1986

Before Bauer, Chief Judge, Cummings and Flaum, Circuit Judges.

CUMMINGS, Circuit Judge. The petitioner, Conrad Schellong, contests a deportation order issued by the United States Immigration Court. Schellong was first denaturalized and later ordered deported for his activities in Nazi concentration camps in pre-war Germany. Two branches of litigation have brought this case before this Court. The first was a suit by the Office of Special Investigations (OSI) against Schellong to revoke his naturalized citizenship. The government was successful in denaturalizing Schellong as recorded in United States v. Schellong, 547 F. Supp. 569 (N.D. Ill. 1982), affirmed by opinion, 717 F.2d 329 (7th Cir. 1983), certiorari denied, 104 S. Ct. 1002. After obtaining its final order of denaturalization, the OSI proceeded to seek an order of deportation. An Immigration Judge granted that order on September 5, 1984. Schellong appealed to the Board of Immigration Appeals, which affirmed the decision of the Immigration Judge on July 11, 1985. Schellong then petitioned this Court for review.

Schellong was denaturalized under 8 U.S.C. Sec. 1451(a) as having procured his certificate of naturalization by concealment of a material fact or by willful misrepresentation. 717 F.2d at 334. This determination was made because of misleading representations on Schellong's visa application and naturalization petition. Because the facts initially determined in the denaturalization litigation are central to the controversy in the case before us, we will quickly summarize those facts. See 547 F. Supp. at 570-574; 717 F.2d at 3311-333.

I. Statement of Facts

Schellong was born in Germany in 1910. In 1932 he joined a branch of the Nazi Party known as the Storm Troopers. He then entered the Schutzstaffel (SS), which provided protective and intelligence services for the Nazi Party. Adolf Hitler came into power in 1933, and Schellong remained a member of the Nazi Party until Hitler's fall in 1945.

In February 1934, Schellong joined the SS Sonderkommando (Special Commando) "Sachsen." The members of this organization were assigned to administrative and guard duties at the Sachsenburg Concentration Camp in Saxony, Germany. The SS Special Commando "Sachsen" were separate from the camp commandant's staff, which supervised the daily operation of the camp. During this time the SS was a Nazi Party organization; it had no military responsibilities. As a corporal at Sachsenburg, Schellong supervised a platoon of guards and served as a Security Officer and a Reserve Officer on a rotating basis. As such, Schellong was in charge of security for the camp for 24-hour periods.

In early 1936 Schellong was temporarily assigned to the SS Guard Unit "Oberbayern" at Dachau Concentration Camp near Dachau, Germany. There he took a platoon leaders' training course. When he returned to Sachsenburg he took command of 30 men who guarded the camp. These guards supervised the prisoners at work sites. The guards were instructed to warn and then shoot to kill any escaping prisoner. They were aware of the treatment given prisoners and of their work and living conditions. As a rotating Security Officer, Schellong was in charge of security for the entire camp for 24-hour shifts.

Late in 1936 petitioner was transferred to the Dachau Concentration Camp and assigned to the Seventh Company of the Death's Head Unit "Oberbayern." Between 1936 and 1939 Schellong commanded several units, all of which performed guard duty at the camp. Schellong trained new recruits and performed other administrative tasks necessary to the supervision of the guards under his command. These guards watched the prisoners on work detail, manned the watchtowers, and generally maintained order in the camp. Schellong was eventually promoted to Capital during his tenure at Dachau.

There was no evidence presented in the denaturalization case that Schellong personally engaged in physical abuse of the prisoners. He did admit, however, that he was aware of the treatment of the prisoners at Dachau-the forced labor, the living conditions, and the arbitrary punishment.

In late 1939 the various Death's Head Units were consolidated into a single military organization that was part of the German Armed Forces. This military organization was called the Waffen SS, or "Armed SS." Schellong remained with the Death's Head Regiment of the Waffen SS in Norway until 1941. For the remainder of the war he served on the eastern front. By the end of the war he had attained the rank of Lieutenant Colonel.

In December 1956 Schellong filed an application for a visa. In response to a question asking applicants to list their previous places of residence, the petitioner responded:

> "Birth-1911, Dresden, Germany; 1911-1934, Leipzig, Germany; 1934-1939, German Waffen SS; 1939-1945, Waffen SS during the war, . . ."

Schellong did not mention his two-year stay at Sachsenburg Concentration Camp or his three-year stay at Dachau Concentration Camp. He was granted a visa and entered the United States in 1957.

Five years later the petitioner filed an application to file a petition for naturalization with the Immigration and Naturalization Service (INS). Question 7 requested the applicant to list her or his memberships in "each organization, association, fund, foundation, club or society." Schellong answered:

Christlicher Verein junger Maenner [Church organization]	1920-1927
Leipziger Ballspiel club [Soccer club]	1926-1932

National Sozialistische Arbeiter Partie [Nazi Party]	1932-1945
Allgemeine SS [ ] elite corps	1932-1934
Waffen SS [ ]	1934-1945
Member of the Church of St. Luke [No others]	1957-Date

Schellong did not include his association with the storm troopers in 1932, the SS Sonderkommando "Sachsen," the SS Wachverbande "Sachsen," the SS Totenkopfverbande "Sachsen," or the SS Totenkopfverbande "Oberbayern" (Death's Head Unit).

During the processing of his naturalization petition Schellong was directed to provide an additional sworn statement concerning his activities between 1934 and 1939. As part of that statement, Schellong wrote, "The Waffen SS was a part of the German Army. I like to be soldier and I signed in 1934... I had never to do any service in an concentration camp and never arrest one man in this matter. I was only soldier." Schellong's petition was granted and a certificate of naturalization issued on July 17, 1962.

The district court found that Schellong willfully concealed and misrepresented material facts in his visa and citizenship applications and so revoked his citizenship pursuant to 8 U.S.C Sec. 1451(a). United States v. Schellong, 547 F. Supp. 569, 574-575 (N.D. Ill. 1982). This Court affirmed the findings of the district court and that revocation. 717 F.2d 329 (1984). In the subsequent deportation case, the Immigration Judge applied the doctrine of collateral estoppel to the facts found in the denaturalization case, and also conducted an independent review of the evidence presented by the government, which was virtually the identical evidence presented in the denaturalization proceedings. The petitioner introduced additional evidence at the deportation hearing relating to the historical use of the term "Waffen SS." The Board of Immigration Appeals affirmed on the basis of collateral estoppel.

Schellong raises essentially three issues on appeal. First he argues that collateral estoppel is inappropriate for deportation cases and that it was incorrectly applied in this case. Second he argues that his activities at Sachsenburg and Dachau Concentration Camps do not rise to the level of persecution for purposes of the Holtzman Amendment. Third he contends that the Holtzman Amendment is unconstitutional as a bill of attainder or ex post facto law. For the reasons discussed below, we affirm the order of deportation.

II. Collateral Estoppel

A. Schellong maintains that the doctrine of collateral estoppel should not be used in deportation cases, citing Title v. INS, 322 F.2d 21 (9th Cir. 1963). In Title the Ninth Circuit reviewed an immigration order deporting an alien because of membership in the Communist Party. The immigration judge had denied Title's request to present evidence at the deportation hearing. all evidence relating to the alien's membership in the Communist Party was adduced by collateral estoppel. The Ninth Circuit ruled that the application of collateral estoppel denied the petitioner the hearing guaranteed by Section 242 of the Immigration and Naturalization Act, 8 U.S.C. Sec. 1252(b). Id. at 24. The court additionally held that application of the doctrine against Title would work an injustice because the petitioner had not testified at the denaturalization hearing but wished to introduce evidence at the deportation hearing because of a change in the law regarding his Communist Party affiliation. Id. at 25.

Title is distinguishable because the alien had presented no evidence at his denaturalization trial and despite a change in the applicable law was not allowed to present evidence at his deportation hearing. Thus, to apply the doctrine of collateral estoppel would work an injustice. We disagree with the Ninth Circuit's holding if it rejects all applications of collateral estoppel in deportation hearings. Under collateral estoppel, once an issue is actually and necessarily decided by a court, that determination is conclusive in a subsequent suit on a different cause of action that involves a party to the earlier litigation. Montana v. United States, 440 U.S. 147, 153, Collateral estoppel has been approved in 42 U.S.C. Sec. 1983 cases, Allen v. McCurry, 449 U.S. 90, criminal cases, United States v. Alexander, 743 F.2D 472 (7th Cir. 1984), to findings in previous deportation hearings, United States v. Colacurcio, 514 F.2d 1 (9th Cir. 1975), and naturalization hearings, Petition of Nispenos, 471 F. Supp. 296 (C.D. Cal. 1979). However, the doctrine is applied flexibly and will not bar relitigation of issues if, as in Title, the party against whom it operates did not have a full and fair opportunity to litigate the issues. Montana, 440 U.S. at 164 n.11; Lumen Construction, Inc. v. Brant Const. Co., 780 F.2d 691, 697 (7th Cir. 1985). Additionally, a judgment which is based on alternative grounds is an effective adjudication as to both and is collaterally conclusive as to both. Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926); 1B Moore's Federal Practice Para. 0.443 [5.-1], at 782.

The right of aliens to a deportation hearing is adequately protected by the requirement that the alien was given a full and fair opportunity to litigate in the prior proceeding, as well as the other requirements for application of collateral estoppel: (1) identity of issues; (2) the issue be actually litigated and determined; (3) the issue be necessary to the judgment; and (4) the party against whom collateral estoppel operates was a party in the previous action. County of Cook v. MidCon Corp., 773 F.2d 892, 898 (7th Cir. 1985). As long as these factors are present and the doctrine's application will not be unjust, collateral estoppel may be applied to deportation proceedings. therefore, it is necessary to examine the facts established in the denaturalization suit against Schellong to see whether they are sufficient to meet the requirements for deportation under Sec. 1251(a)(1) and (19).(1)

B. The petitioner contends that in the denaturalization proceeding the district court held only that he concealed material facts, not that he willfully misrepresented them. The essential elements for denaturalization differ from those for deportation. Denaturalization is permitted when

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1 Schellong claims that the bulk of the district court's findings in the denaturalization case were based on Rule 36 admissions. Thus, to apply collateral estoppel to those findings would violate Rule 36, which forbids use of the admissions in any other proceeding. However, defendant failed to raise this issue below and has thus waived it. Gehl v. Commissioner, 795 F.2d 1324 (7th Cir. 1986). Additionally, the substance of the admissions-the number and nature of prisoners and the conditions of the concentration camps-was discussed by a number of witnesses.

the certificate and order of naturalization were procured by concealment of a material fact or by willful misrepresentation. 8 U.S.C. Sec. 1451(a). In contrast, the deportation statute requires that the government prove misrepresentation or fraud, not concealment. 8 U.S.C. Sec. 1251(a)(1). Because concealment is irrelevant for purposes of deportation, Schellong argues the issues in the two cases are not co-extensive and, therefore, the government has not met its burden.

Petitioner's argument is unpersuasive for two reasons. First, this Court and the district court based their holdings on both concealment and willful misrepresentation. This Court stated: "In light of these facts, the district court did not err in finding willful misrepresentation or concealment." 717 F.2d at 334. Likewise the district court refers to both issues in its opinion, e.g., "[i]n this case, the court finds that the misrepresentations and concealment were willful." 547 F. Supp. at 576. And when a court relies on alternative grounds for its decision, either of which are necessary to the judgment, both grounds are collaterally conclusive. See generally 1B Moore's Federal Practice Para. 0.443[5.-1], at 782.

Alternatively, assuming that the district court held only that concealment was proven, the facts established (and necessary to the judgment) in the denaturalization suit sufficiently demonstrate that Schellong willfully misrepresented material facts on both his visa application and his naturalization petition. "[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." United States v. Stauffer Chemical Co., 464 U.S. 165, 170-171; United States v. Mendoza, 464 U.S. 1544, 158. On his visa application Schellong not only concealed his stays at the Sachsenburg and Dachau

Concentration Camps, he wrote instead "Waffen SS" as his residence for that time period (1934-1939). Furthermore, on his petition for naturalization he again used the term "Waffen SS" and said it was a part of the German army. The district court ruled that the term "Waffen SS" was a misrepresentation designed to conceal his presence at the two concentration camps because the Waffen SS was not formed until 1939. 547 F. Supp. at 576. In so ruling the district court rejected Schellong's argument that "Waffen SS" was an umbrella term for all armed SS personnel.(2) Moreover, in his worn statement on the petition for naturalization Schellong misrepresented that he had never served at a concentration camp; that was clearly false. Id. Each of these findings was upheld by this Court on appeal. 717 F.2d at 334.

Schellong contends that this Court explicitly held that he made no misrepresentation on his visa application. Schellong refers to language in the opinion that reads: "If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation * * *. For all we know at this point, Schellong might have entered 'Waffen SS' as a form of shorthand for his residences, fully intending to clarify the answer if given the opportunity to do so." However, we went on to say, "The visa application is not, however, the only alleged instance of willful misrepresentation or

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2 Schellong also argues that his additional evidence introduced in the deportation hearing regarding the use of the term "Waffen SS" was ignored. However, collateral estoppel bars relitigation of whether there were misrepresentations on the visa and naturalization applications.

concealment," and then discussed the naturalization petition. Therefore, the Board of Immigration Appeals is correct that this Court decided that Schellong's later misrepresentations indicated the true nature of his answer on the visa application-he was, even then, attempting to mislead government authorities to gain entrance to the United States. In sum, the Board of Immigration Appeals did not err in relying on collateral estoppel to establish the requisite facts for deportation under Sec. 1251(a)(1). See United States v. Demjanjuk, No. 85-3198, slip op. at 7 (6th Cir. 1985).

C. Schellong also contends that the facts established in the denaturalization proceeding do not support a deportation order under the Holtzman Amendment, 8 U.S.C. Sec. 1251(a)(19). That Section mandates deportation of any alien who:

> during the period beginning on march 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

Schellong makes several arguments. First he asserts that the district court explicitly ruled that there was no evidence presented that he personally engaged in acts of persecution. As part of that argument, Schellong maintains that knowledge of persecution as well as personal active involvement in atrocities is required to show that he assisted the Nazis in persecuting civilians. Schellong further argues that the term "persecution" is both unconstitutionally vague and overbroad.

Section 1251(a)(19) is an additional independent ground of deportation. However, a deportation order under section (a)(19) is significant because Section 1254(a) disallows suspension of deportation of aliens described in Section 1251(a)(19). We agree with Schellong that both the district court and Court of Appeals explicitly noted that the evidence had not implicated him in any specific incidents of violence against the prisoners at either Sachsenburg or Dachau Concentration Camps. Therefore we must decide whether Schellong's service as a Nazi concentration camp guard alone is assistance "in the persecution of any person" for purposes of Section 1251(a)(19).(3)

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3 Schellong also contends that a finding of persecution was not necessary to the judgment of denaturalization. All we need consider, however, is whether the finding that Schellong served as a concentration camp guard was necessary to the denaturalization judgment. Schellong's activities as a camp guard are what make the misrepresentations and concealments "material" under Sec. 1451(a). They are material because revelation of that fact would have rendered Schellong inadmissible under the Immigration and Nationality Act of 1952. Fedorenko, 449 U.S. at 507-514; see also United States v. Schellong, 717 F.2d at 335.

In United States v. Kairys, 782 F.2d 1374, 1377 n.3 (7th Cir. 1986), certiorari denied, 106 S. Ct. 2258, we held that service as a Nazi concentration camp guard equalled persecution of civilians for purposes of Section 2(b) of the Displaced persons Act of 1948, 62 Stat. 1009, without proof of personal involvement in atrocities (interpreting Fedorenko v. United States, 449 U.S. 490, 512-513 n.34). Schellong does not dispute that he served as a concentration camp guard at Sachsenburg and trained and supervised guards at Dachau. It is that critical fact, conclusively established in the denaturalization proceeding, which may not be relitigated in the deportation proceedings by virtue of collateral estoppel.

Likewise, an individual who served as a guard has assisted in persecution for purposes of Section 1251(a)(19). The purposes of the two statutes were identical: to exclude from the united States individuals who along with the Nazis had inflicted suffering on persons because of their race, religion, or political opinion. The exception to the applicability of collateral estoppel for "unmixed questions of law" arising in "successive actions involving unrelated subject matter" does not apply here. See United States v. Stauffer Chemical Co., 464 U.S. 165 (citing Montana, 440 U.S. at 162). Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression.

Schellong cites Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985), and United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985), as support for his position that an individual must have "actively" or "personally" participated in persecution. Insofar as these cases hold that personal involvement in atrocities is necessary to have assisted in persecution for purposes of the DEP or the Holtzman Amendment, they conflict with Fedorenko, 449 U.S. at 512 n.34. See 750 F.2d at 1432 and 763 F.2d at 122-123. In addition, the cases are factually distinguishable from the one before us. Neither defendant guarded prisoners at a concentration camp, rather both were local police officers not associated with the Nazi SS. See 750 F.2d at 1437, 763 F.2d at 122-123.

Schellong next argues that he had no knowledge of the persecution but rather believed that the prisoners were there either because they had broken German laws or for their own protection. We need not address the issue of whether Section 1251(a)(19) requires knowledge of the persecution in order to "assist" in the persecution. the facts established in the denaturalization proceeding negate Schellong's assertion that he did not know of the persecution. Schellong guarded prisoners who wore different colored arm bands to represent their "class," whether Jewish, clergy, or political opponents of the Nazi regime. he guarded prisoners on a rotating basis and supervised other guards for over 5 years. During that time he was promoted from corporal to captain. Furthermore, Schellong was at Dachau in November 1938 when the number of prisoners increased dramatically from 4,000 to 14,000. This increase was the result of Kristallnacht, a pogrom throughout Germany in which the Nazis destroyed synagogues and Jewish-owned homes and property, as well as arbitrarily arrested thousands of Jews. Schellong's assertion that he remained unaware of the persecutorial nature of the concentration camps is incredible.

Schellong distinguishes Kalrys and Fedorenko on the ground that he served at

Sachsenburg and Dachau in prewar Germany before these and other concentration camps became "death mills." We see no merit to this distinction. First, the language of Section 1251(a)(19) specifically includes the 1934-1939 time period. And the conditions (incarcerations, forced labor, cruel and inhuman treatment, arbitrary and severe punishment) were sufficient to rise to the level of persecution.

> The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt.

The Nurnberg Trial, 6 F.R.D. 69, 131 (1946).

Finally, Schellong attacks Section 1251(a)(19), arguing that the term "persecution" is overbroad and vague. This argument has no merit. Although the term is not defined in the Immigration and Nationality Act, it is explained in its legislative history. The House Judiciary Committee noted that in light of the "substantial body of precedent," there was no need to define the phrase "persecution because of race, religion, national origin or political opinion." H.R. Rep. No. 95-1452, 95th Cong., 2d Sess., at 6 (1978). The precedent referred to by the Committee includes the Displaced persons Act, the Refugee Relief Act of 1953, other provisions of the Immigration and Nationality Act (see Secs. 1153(a)(7) and 1253(h)), international agreements, and opinions of the Nurnberg tribunals. Id. at 2-3, 4-7. According to the Committee, the general standard of persecution is "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments." Id. at 5. The Ninth Circuit recently addressed this very issue in Artukovic v. INS, 693 F.2d 894, 896 (9th Cir. 1982), and also held that the legislative history and court interpretations adequately defined persecution. We hold that Section 11251(a)(19) is not unconstitutionally vague or overbroad.

III. Bill of Attainder and Ex Post Facto

Schellong argues that both the Holtzman Amendment (8 U.S.C. Sec. 1241(a)(19) and Section 244(a) of the Immigration and Naturalization Act (8 U.S.C. Sec. 1254(a)) are bills of attainder and operate as ex post facto laws in violation of the Constitution. U.S. Const. art I, Sec. 9, cl. 3. Schellong argues that the purpose of both was to punish individuals involved in Nazi Germany. The Holtzman Amendment, Section 241(a)(19), was enacted in 1978. Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. Sec. 1251(a)(19)). The provision making aliens who are deportable under Section 241(a)(19) ineligible for suspension of deportation was added in 1981. Pub. L. No. 97-116, 95 Stat. 1616 (codified at 8 U.S.C.. Sec. 1254(a)).

A bill of attainder is a legislative act that inflicts punishment without a judicial trial. Cummings v. Missouri, 71 U.S. (4 Wall.) 277; Linnas v. INS, 790 F.2d 1024, 1028 (2d Cir. 1986). A bill of attainder "assumes * * * Judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial." Cummings, 71 U.S. (4 Wall.) at 323. An ex post facto law is one that makes certain actions or behaviors unlawful after the fact. The Holtzman Amendment, Sec. 1251(a)(19), requires that persons who have participated in Nazi persecution from 1933 to 1939 be deported. Section 244(a) eliminates the Attorney General's power to grant such persons discretionary relief. Deportation is required even though the deportee's life or freedom is endangered.

The Second Circuit in Linnas recently held that the Holtzman Amendment and Section 244(a) of the Immigration and nationality Act (Secs. 1251(19) and 1254(a)) did not constitute a bill of attainder. 790 F.2d at 1029-1030. The court reasoned that deportation (especially of non-citizens) has never been considered as punishment. Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982), was consistent with Linnas and also addressed the ex post facto issue. Artukovic held that because deportation is not a punishment, the Holtzman Amendment did not violate the ex post facto and bill of attainder provisions in Art. I, Sec. 9 of the Constitution. the purpose of these statutes is not to punish individuals for actions previously taken, but to ensure that the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people. The Holtzman Amendment condemns the senseless genocide of Jews and other minority groups by refusing to harbor here those involved in the persecution. H.R. Rep. No. 1452, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 4700. We agree with both the Second and Ninth Circuits that these statutory provisions do not constitute bills of attainder, nor are they ex post facto laws.

IV. Conclusion

For the reasons discussed above the decision of the Board of Immigration Appeals is affirmed.

A true Copy:

Teste:

United States Department of Justice
Executive Office of Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A10 695 922 - Chicago
In re: CONRAD HEINRICH SCHELLONG a/k/a HEINRICH CONRAD SCHELLONG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Charles W. Nixon, Esquire
29 South LaSalle Street, Suite #340
Chicago, Illinois 60603

ON BEHALF OF SERVICE:
Joseph F. Lynch
Trial Attorney
Office of Special Investigations
United States Department of Justice

ORAL ARGUMENT: April 22, 1985

CHARGES:

Order:

Sec. 241(a)(1), I&N Act [8 U.S.C. Sec. 1251(a)(1)] -- Excludable at entry under section 212(a)(19) of the Act, [8 U.S.C. Sec. 1182(a)(19)] - Procured visa by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. Sec. 1251(a)(1)] -- Excludable at entry under section 212(a)(20) of the Act, [8, U.S.C. Sec. 1182(a)(20)] - No valid immigrant visa

Sec. 241(a)(19), I&N Act [8 U.S.C. Sec. 1251(a)(19)] -- Participation in Nazi persecution

APPLICATION: Termination of proceedings; Suspension of deportation; Section 241(f)(1) relief

The respondent appeals from the immigration judge's decision of September 5, 1984, finding the respondent deportable as charged and denying him relief from deportation. We affirm the immigration judge's decision.

The respondent is a 75-year-old male who is a native of Germany. He entered the United States as a lawful permanent resident on February 23, 1957. On July 17, 1962, he became a naturalized citizen of the United States.

Subsequently, the Government brought a denaturalization action against the respondent in the United States District Court for the Northern District of Illinois. United States v. Schellong, 547 F. Supp. 569 (N.D. Ill. 1982). The Government alleged that the respondent illegally procured his citizenship because his use of the term "Waffen SS" in both his visa application and his naturalization petition in reference to his activities during the period from 1934-1939 was willfully false and designed to conceal his service at the Sachsenburg and Dachau concentration camps.(1) The Government further contended that his supplemental statement of his naturalization petition that the Waffen Ss was "a part of the German Army," and that he "had never to do any service in any concentration camp," was also false and was willfully made for the purpose of concealing his concentration camp activities. The district court found in favor of the Government and entered a judgment of denaturalization revoking the respondent's citizenship and canceling his certificate of naturalization. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of denaturalization and the United States Supreme Court declined to review the matter. United States v. Schellong, 717 F.2d 329 (7th Cir. 1983), cert.. denied, 104 S. Ct. 1002 (1984).

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(1) The Waffen SS was a "distinct and separate branch of the German Armed forces." The district court found that prior to 1940, no organization by that name existed. United States v. Schellong, 547 F.Supp. 569, 571 (N.D. Ill. 1982).

On December 1, 1983, the Immigration and Naturalization Service commenced deportation proceedings against the respondent charging him with deportability on three bases: (1) pursuant to section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1251(a)(1), as an alien who was excludable at the time of entry under section 212(a)(19) of the Act, 8 U.S.C. Sec. 1182(a)(19), in that he sought to and did procure a visa or other documentation, or sought to and did enter the United States by fraud or by willfully misrepresenting material facts; (2) pursuant to section 241(a)(1) of the Act, in that he sought to and did procure a visa or other documentation, or sought to and did enter the United States by fraud or by willfully misrepresenting material facts. Thus, at the time of his application for admission to the United States, he was not in possession of a valid unexpired immigrant visa and therefore was excludable under section 212(a)(20) of the Act; (3) pursuant to section 241(a)(19) of the Act, as an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national orgin or political opinion during the period of March 23, 1933 to May 8, 1945.

At the deportation hearing held before the immigration judge, the respondent denied the charges of deportability. To prove its case, the Service relied upon the testimony, exhibits, and the judgment in the denaturalization case, all of which were admitted into evidence by the immigration judge. In defense of the Service's charges, the respondent submitted various pleadings and memoranda from the denaturalization proceedings. The respondent also argued that he was eligible for a waiver of deportability under section 241(f) of the Act and for suspension of deportation pursuant to section 244(a) of the Act, 8 U.S.C. Sec. 1254(a).

In a written decision dated September 5, 1984, the immigration judge applied the doctrine of collateral estoppel to the factual and legal issues resolved by the denaturalization judgment to find the respondent deportable as charged and ineligible for relief from deportation. The immigration judge then ordered the respondent deported to the Federal Republic of Germany. In a timely appeal, the respondent has challenged the immigration judge's use of collateral estoppel to establish deportability and ineligibility to relief from deportation.

THE LEGAL EFFECT OF THE JUDGMENT IN THE DENATURALIZATION PROCEEDING

In order for the judicially-developed doctrine of collateral estoppel to be applied in a deportation proceeding there must have been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect and the parties must have been accorded a full and fair opportunity to litigate the issues in the prior suit. Matter of Fedorenko, Interim Decision 2963 (BIA 1984). In addition, the use of collateral estoppel must not be unfair to the parties. Id.

These prerequisites are satisified in the respondent's case. The district court's denaturalization judgment is a final judgment and may be accorded conclusive effect because it was affirmed by the court of appeals and was denied review by the Supreme Court. In addition, because the denaturalization proceeding was before a federal district court and subject to the strict judicial rules of evidence, the respondent was given a full and fair opportunity to litigate the issues in his case. We also find it fair to apply collateral estoppel in this proceeding. The respondent and the United States, who were the parties in the denaturalization proceeding, are also the parties in this proceeding, and the Government's burden of proof in the denaturalization proceedingg was the same as its burden in this proceeding. See Woodby v. INS, 385 U.S. 276, 285-86 (1966); Matter of Fedorenko, supra. Moreover, both the respondent and the Government reasonably could have foreseen that issues raised in the denaturalization proceeding might be raised in a subsequent deportation proceeding.

The respondent has argued against application of the doctrine of collateral estoppel on the ground that the denaturalization proceeding did not provide him with a fair opportunity to litigate the issues in this case. First, the respondent contends that he was deprived of the opportunity to confront the witnesses against him because the Government should have been requied to pay for his attorney to attend depositions taken by the Government in California and Europe. Second, he contends that the district court failed to consider an untranslated part of a 1942 German document which indicated that he was a member of the Waffen SS from 1934 to 1939. Third, he contends that he was deprived of due process by the December 29, 1981 amendment to section 244(a) of the Act, which governs the availability of suspension of deportation.(2)

The Seventh Circuit has already rejected the respondent's argument that the Government was required to pay for his attorney's presence at the depositions. An alien facing deportation who fails for financial reasons to attend the taking of testimony against him or to send his lawyer to confront the witnesses against him has not been denied the right of cross-examination but has in fact waived it. Kishan Singh v. District Director of Immigration, 83 F.2d 95, 96 (9th Cir.), cert. denied, 299 U.S. 561 (1936); Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955), aff'd, 350 U.S. 990 (1956). We also find without merit the respondent's claim that he was denied due process because the district court failed to consider an untranslated part of a 1942 German document which indicated that he was a member of the Waffen SS from 1934 to 1939. This claim was rejected by the district court because of the Government's expert testimony that prior to 1940, the term "Waffen SS" was not used. We also dismiss the respondent's claim that he was deprived of due process in his district court litigation by the December 29, 1981, amendment to section 244(a) of the Immigration and Nationality Act, 8 U.S.C. 1254(a) regarding the availability of suspension of deportation. This argument was flatly rejected in Matter of Fedorenko, supra.

In summary, we are satisified that the respondent received a full and fair opportunity to litigate the issues resolved by and necessary to the judgment in his denaturalization proceeding. See

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(2) This provision prohibits an alien deportable under section 241(a)(19) from obtaining suspension of deportation.

id. Thus, it is appropriate to apply collateral estoppel to the issues resolved by the denaturalization judgement.

(1) Findings of Fact Conclusively Established by the Denaturalization Judgment.

Under the doctrine of collateral estoppel, the respondent's denaturalization judgment conclusively establishes the "ultimate facts" of this deportation proceeding, i.e., those facts upon which the respondent's deportability and eligibility for relief from deportation are to be determined and precludes reconsideration of issues of law resolved by the prior judgment so long as the issues in the prior suit and the deportation proceeding arise from virtually identical facts and there has been no change in the controlling law. The Evergreens v. Nunan, 141 F.2d 927, 930-31 (2d Cir.), cert. denied, 323 U.S. 720 (1944); Matter of Fedorenko, supra. There are three general categories of facts which we consider to be "ultimate" in this case. The first category consists of facts which pertain to the respondent's citizenship and nationality. These are "ultimate facts" because they are relevant to the issue of the respondent's alienage and thereby determine whether he is subject to the various deportation provisions of section 241(a) of the Act.(3) The second category consists of facts which pertain to the respondent's activities during World War II, and in particular to activities at the Sachsenburg and

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(3) Section 241(a), which is the basis for the Service's charges of deportability, pertains only to an "alien." The term "alien" means any person who is not a citizen or national of the United States. Section 101(a)(3) of the Act, 8 U.S.C. Sec.. 1101(a)(3).

Dachau concentration camps. These are "ultimate facts" because they determine the respondent's deportability under section 241(a)(1) and (19), for the fraudulent procurement of a visa and for assisting the Nazis in persecuting others. In addition, these facts are relevant to the respondent's eligibility for various forms of relief from deportation. The third category of "ultimate facts" consists of facts pertainingg to the respondent's application for a visa and his immigration to this country in 1957. These are "ultimate facts" because they, too, determine the respondent's deportability under section 241(a)(1). The following facts established by the denaturalization judgment come within one of these three categories.

The respondent was born in Dresden, Germany, in 1910. In February 1934, the respondent joined the SS Sonderkommando "Sachsen" (SS Special Ccommando "Sachsen") stationed at the Sachsenburg Concentration Cammp in Saxony, Germany. Upon completion of basic training, he was assigned to guard the prisoners and prevent escapes from the Sachsenburg concentration camp. United States v. Schellong, 547 F. Supp. at 570.

In early 1936, he was assigned for four months to the SS Guard Unit "Oberbayern" at Dachau Concentration Camp where he participated in a platoon leaders' training course. After completing the course, he returned to Sachsenburg and, in April 1936, was promoted to Second Lieutenant. Id. His activities there included the training of concentration camp guards and service as camp security officer and as a reserve officer on a rotating basis. he instructed the guards under his supervision to prevent escapes from the camp and told them that if a prisoner was seen escaping, they were to warn the prisoner and then shoot to kill him. Id. at 571. During the time he was stationed at Sachsenburg, the camp held approximately 400-500 prisoners, including political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, and Jews. Id. at 571 n.l.

In late 1936, the respondent was transferred to Dachau Concentration Camp where he was assigned to the 7th Death's Head Company of the Death's Head Unit "Oberbayern." His duties at Dachau included training new recruits, preparing the duty roster of concentration camp guards, and supervising the guards under his command. Id. at 571. While he was stationed at Dachau, it held between 4,000 and 14,000 prisoners, who were mostly Jews, Jehovah's Witnesses, Protestant and Catholic clergy, and other opponents of the Nazi regime. Id. at 571 n.l. In late 1939 or early 1940, he transferred to the newly designated Waffen SS (Military SS) and throughout World War II fought on the Eastern Front. Id. at 571.

The district court concluded that the respondent was aware of the inhuman treatment, the forced labor, the poor living conditions, and the punishment of the prisoners whom he guarded at Sachsenburg and Dachau. Specifically, he witnessed at least two floggings of prisoners while at Sachsenburg, and he personally took turns checking on prisoners being held in solitary confinement at the camp. Furthermore, the guards were aware of the work detail of hard labor assigned to the prisoners, including shoveling sewage, breaking rocks, and hauling stones. The respondent himself stated that he knew that Dachau was not a "nice place to be," and that the punishment of prisoners and their living and work conditions was not a "nice subject." Id. at 571.

On December 3, 1956, the respondent filed an application for Immigrant Visa and Alien Registration with the United States Consular Office in Hamburg, Germany. He was granted a visa to enter the United States on January 24, 1957, and became a naturalized citizen on July 17, 1962. The district court found that he willfully concealed his service at the Sachsenburg and Dachau concentration camps during the period from 1934-1939, on his visa application and naturalization petition. Id. at 576; see supra p. 2.

Since the foregoing facts found in the denaturalization proceeding are also "ultimate facts" in this case, we consider them to be conclusively established by operation of the doctrine of collateral estoppel.

The district court found that the misrepresentations made by him on his visa application and during his naturalization process "alternatively represent statements which conceal the fact of the defendant's membership in the SS Death's Head Unit and his service supervising guards in the Sachsenburg and Dachau concentration camps." Id. at 575. The respondent contends that because two alternative grounds for denaturalization were found, neither may be accorded collateral estoppel effect.

We disagree with the respondent's contention. Application of the doctrine of collateral estoppel is not to be abandoned merely because a prior judgment rested on multiple independent grounds. Williams v. Ward, 556 F.2d 1143 (2d Cir.), cert. denied, 434 U.S. 944 (1977). Collateral estoppel should be applied whenever an issue was raised, litigated, and adjudged in a prior action, even if the curt in the prior action determined two or more issues each of which would have been sufficient to support the judgment. Winters v.

Lavine, 574 F.2d 46, 67 (2d Cir. 1978); Moore, *Federal* practice and Procedures Sec. 0.443 at 789-90 (2d ed. 1981). Accordingly, both Schellong's visa and naturalization misrepresentations were entitled to conclusive effect in the deportation proceedings.

The respondent also argues that the court of appeals never specifically found that he misrepresented his war time activities on his visa application. We disagree. Specifically, the court stated as follows:

> [T]here were sufficient facts introduced into evidence to show that if the *visa examiner* or the naturalization examiners had been aware of defendant's role at Sachsenburg as a trainer and supervisor of guards, and a rotating Security Officer and Officer on Reserve; and of his role at Dachau as a trainer of troops held on reserve for guard duty, and as a member of the SS Death's head Units, they would have either denied his *visa application* and naturalization petition (Tr. 43, 65, 94), *Fedorenko* v. *United States*, 449 U.S. at 514-516, or continued them pending a more detailed investigation (Tr. 67), "possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt* v. *United States*, 364 U.S. 350, 355; *United States* v. *Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979), affirmed without affirming or denying this particular aspect of materiality, 449 U.S. at 518 n.40. *U.S.* v. *Schellong*, 177 F.2d at 335. [Emphasis added.]

The court in *dicta* expressed the view that "if this case centered *only* around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation." Id. at 333-344. However, the court ultimately concluded that there was more than eough additional evidence to support the district court's conclusion that the respondent had committed visa fraud. Id. at 335. Even were we to assume arguendo, that the court of appeals only affirmed the district court's finding of fraud on the respondent's naturalization petition, he would still be barred from relitigating the visa misrepresentation issue. When one or more, but not all, of the alternate grounds for a trial judgment are affirmed on appeal, all of the trial court's findings retain their preclusive effect in subsequent litigation. Blum v. William Goldman Theatres, Inc., 174 F.2d 914, 916 (3d Cir. 1949).

(2) Matters of Law Conclusively Established by the Denaturalization Judgment.

In the denaturalization proceeding, the district court reached conclusions of law which are material to issues in this proceeding. Specifically, the district court concluded that under section 212(a)(19) of the Act, the respondent was excludable from the United States at the time of his entry, since if he had "not concealed his correct residence on his visa application in 1956, he would have been considered ineligible to receive an immigration visa by virtue of his service at Sachsenburg and Dachau." United States v. Schellong, 547 F. Supp. at 575.

The doctrine of collateral estoppel may be applied to preclude reconsideration of issues of law, as well as fact, so long as the issues arise in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law. Matter of Fedorenko, supra. These conditions are met in this case. The issue of the respondent's inadmissability under section 212(a)(19) of the Act arises in this proceeding because the respondent was charged with deportability under section 241(a)(1) of the Act for being excludable at the time of entry. Moreover, the issues arise in this proceeding out of the identical facts and the same principals of law that were considered by the district court.

Accordingly, the legal issues of the respondent's excludability and unlawful entry were precluded from reconsideration in the deportation proceedings. Thus, the immigration judge properly found the respondent deportable under section 241(a)(1) of the Act.

The Respondent's Deportability

The question of the respondent's deportability pursuant to section 241(a)(19) of the Act was not actually litigated in the denaturalization proceeding and therefore collateral estoppel does not automatically resolve this issue. Nevertheless, the facts conclusively established by collateral estoppel show the respondent to be deportable pursuant to section 241(a)(19). That section provides for the deportation of aliens who--

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--
>
> > (A) the Nazi government of Germany,
> > (B) any government in any area occupied by the military forces of the Nazi goverment of Germany,
> > (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
> > (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

The fact that the respondent's activities for the Nazi SS took place from 1934-1939 establishes that they fall within the period of time specified by section 241(a)(19). The elements of that section which are at issue are whether: (1) the respondent "assisted or otherwise participated in the persecution of any person" (2) "because of race, religion or political opinion" and did so (3) "under the direction of, or in association with" the Nazi government of Germany.

(1) "Assisted or otherwise participated in the persecution of any person"

The term "persecution" as used in section 241(a)(19) contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, i.e., race, religion, national origin, or political opinion. Matter of Laipenieks, 18 I&N Dec. 433 (BIA 1983), rev'd on other grounds, Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985). The harm or suffering inflicted may take various forms but it most certainly includes physical confinement. Id. The facts established by collateral estoppel show that from 400-500 persons were confined at the Sachsenburg concentration camp while he served there, including political prisoners, Jehovah's witnesses, Protestant and Catholic clergy, and Jews. In addition, Dachau concentration camp held between 4,000 and 14,000 prisoners who were mostly Jews, Jehovah's Witnesses, Protestant and Catholic clergy, and other opponents of the Nazi regime. The imprisonment of these inmates at the Sachsenburg and Dachau concentration camps clearly constituted "persecution" of them within the meaning of section 241(a)(19). Id. See also Matter of Fedorenko, supra.

The respondent argues that the findings of the district court are not sufficient to meet this element of section 241(a)(19), because there was no evidence of persecution against the prisoners at Sachsenburg and Dachau or that the prison guards engaged in acts of brutality against them. We reject this claim. The district court cited too many examples of the physical abuse and the poor and oppressive living conditions at the Sachsenburg and Dachau concentration camps during the time he served there. The respondent himself admitted that he was aware of the inhuman treatment of the prisoners he guarded including the forced labor and severe punishment inflicted upon them. United States v. Schellong, 547 F. Supp. at 574; see supra p. 6.

Furthermore, deportability under section 241(a)(19) does not require that the respondent or other guards engaged in acts of brutality against the prisoners. Section 241(a)(19) makes an alien deportable if he merely "assisted" in the persecution of others. We have already held that the actions of a Ukranian prisoner of war who was forced by the Nazis to guard the perimeter of a concentration camp constitutes assistance in persecution within the meaning of section 241(a)(19) because his actions would have aided the Nazis, at least in some small measure, in their confinement of the prisoners at the camp. Matter of Fedorenko, supra. Thus, it is irrelevant whether the prison guards themselves committed acts of brutality against the prisoners. The respondent's involvement in supervising and training prison guards at the Dachau and Sachsenburg concentration camps constitutes assistance in persecution within the meaning of section 241(a)(19) because his actions would have significantly aided the Nazis in their confinement of the prisoners at the camp. Id.

(2) Persecution "because of race, religion . . . or political opinion"

The facts established by collateral estoppel show that both the Sachsenburg and Dachau concentration camps confined Jews, Catholics, Jehovahs Witnesses and political prisoners. The absence of a finding that the respondent had either religious or political motivations for his actions does not alter the fact that he "assisted" in physical persecution which occurred "because of" official policies directed against people of the Jewish race and religion, of other religions, and with different political beliefs. Matter of Fedorenko, supra; Matter of Laipenieks, supra. Thus, his conduct clearly constituted assistance in persecution "because of race, religion or political opinion."

(3) "Under the direction of, or in association with the Nazi government of Germany".

The facts established by collateral estoppel reveal that as a concentration cap guard, guard commander, and guard trainer, the respondent served in the Nazi SS. Thus, these findings clearly demonstrate that his activities at the Sachsenburg and Dachau concentration camps were "under the direction of, or in association with" the Nazi government of Germany.

Accordingly, the facts discussed above show clearly, unequivocally, and convincingly that from 1934-1939, under the direction of, or in association with the Nazi government of Germany, the respondent assisted in the persecution of persons because of their race, religion or political opinion. Therefore, the immigration judge correctly found the respondent deportable pursuant to section 241(a)(19) of the Act

The respondent argues that he may not be found deportable pursuant to section 241(a)(19) because it is an unconstitutional ex post facto law or bill of attainder. This argument lacks any merit whatsoever. See Artukovic v. INS, 693 F.2d 894 (9th Cir. 1982). It is well-settled that the creation of a retroactive ground for deportation does not violate the ex post facto prohibition. Marcello v. Bonds, 349 U.S. 302, 3144 (1955); Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Saughnessy, 342 U.S. 580, 594 (1952). That prohibition applies only to criminal statutes and deportation laws are civil, not criminal, in nature. Id. Moreover, the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder. See, e.g., MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959), cert. denied, 362 U.S. 961 (1960); Quattrone v. Nicolls, 210 F.2d 513, 519 (1st Cir.), cert. denied, 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. United States v. Brown, 381 U.S. 437, 442-44 (1965). This is clearly not the effect of section 241(a)(19), deportation is not punishment (Harisiades v. Saughnessy, supra, at 594), and section 241(a)(19) does not deprive an alien of his right to a full evidentiary hearing on the issue of his deportability, with the right to judicial review. See sections 106(a) and 2429b) of the Act, 8 U.S.C. Sec. 1106(a) and 1252(b).

Respondent's Eligibility for Relief From Deportation

The respondent has argued that the immigration judge erred in finding him ineligible for relief from deportation under sections 241(f) and 244(a). Relief afforded under each of these provisions is unavailable to an alien who is deportable pursuant to section 241(a)(19) of the Act. See sections 2441(f)(1)(A) and 244(a) of the

Act, as amended by Pub. L. No. 97-116, Sec. 8 and 18(h)(2), 95 Stat. 1611, 1616, 1620 (1981) [codified at 8 U.S.C. Secs. 1251(f)(1)(A) and 1254(a) respectively], since the respondent is deportable pursuant to section 241(a)(19), he is precluded as a matter of law from obtaining the relief sought and the immigration judge correctly denied the respondent's applications.

ORDER: The appeal is dismissed.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Conrad Heinrich SCHELLONG,
Defendant-Appellant.

No. 82-2948.

United States Court of Appeals,
Seventh Circuit.

Argued May 11, 1983.
Decided Aug. 24, 1983.*

Opinion Sept. 15, 1983.

Before CUMMINGS, Chief Judge, ESCHBACH, Circuit judge, and CAMPBELL, Senior District Judge.**

CUMMINGS, Chief Judge.

Defendant Conrad H. Schellong appeals from a district court order setting aside a prior order admitting defendant to citizenship, and cancelling defendant's Certificate of Naturalization. United States v. Schellong, 547 F.Supp. 569 (N.D.Ill.1982). Plaintiff, the United States of America, brought this action pursuant to Section 340(a) of the

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*This appeal was originally decided by unreported order on August 24, 1983. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

**The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Immigration and Nationality Act of 1952, as amended, 8 U.S.C. Sec. 1451(a), to revoke the citizenship of the defendant on the grounds that he procured his citizenship illegally and by concealment or willful misrepresentation of a material fact.

The controversy centers around Schellong's activities between 1932 and 1939 as he described them in 1956 on his visa application, in 1962 on his petition for naturalization, and in a supplemental statement filed in connection with that petition. The evidence in the record shows that in 1932 defendant joined the para-military unit of the Nazi Party, the Sturmabteilungen, more commonly known as the storm troopers, "brown shirts" or "SA". He remained a member of the SA for several months. In December of 1932 defendant joined both the Nazi Party and the Schutzstaffel, commonly known as the Allgemeine SS, and he remained a member of the Allgemeine SS until 1934. As the district court found, "[t]he principal function of the Allgemeine SS in the early 1930's was to guard Nazi Party speakers and to carry out party intelligence, although the SS gradually assumed the additional responsibility of the administration and guarding of the concentration camps." 547 F.Supp. at 570. In February 1934, defendant joined the SS Sonderkommando "Sachsen" (SS Special Commando "Sachsen") which was stationed at the Sachsenburg Concentration Camp in Saxony, Germany. The SS Special Commando "Sachsen" was renamed the SS Wachverbande "Sachsen" (SS Guard Unit "Sachsen") in late 1934, and in April 1936 was again renamed the SS Totenkopfverbande "Sachsen" (SS Death's Head Unit "Sachsen").

In early 1936, defendant was assigned for approximately four months to the 11th Company of the SS Guard Unit "Oberbayern" at Dachau

Concentration Camp, near Dachau, Germany, where he participated in a platoon leaders training course. He returned to Sachsenburg for several months, and was then transferred to Dachau and assigned to the 7th Company of the Death's Head Unit "Oberbayern". Defendant remained at Dachau until December 1939, commanding the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company, all of which were rifle companies. In late 1939 as the German war effort mounted, the SS Death's Head Units were consolidated into a single military organization called the Waffen SS ("armed" SS). This organization was never considered a part of the German armed forces, the Wehrmacht. During this time, defendant rose from a corporal at Sachsenburg in October 1934 to a Captain at Dachau in August 1939. By the end of the war, he held the rank of Lieutenant Colonel.

While at Sachsenburg, defendant's responsibilities included training and supervising a platoon of guards, and service as a Security Officer and a Reserve Officer on a rotating basis with other platoon leaders. During defendant's rotation as Security Officer, he was in charge of security for the entire camp for twenty-four hour periods. Incident to defendant's duties, he instructed the guards under his supervision to prevent escapes from the camp, to warn escaping prisoners and then shoot to kill. Defendant also had responsibility on least one occasion for checking on a prisoner, Erich Jacoby, who was being held in solitary confinement.

The district court found that "at Dachau, the defendant supervised guard troops who watched the prisoners on work detail, manned the watchtowers to prevent escapes, and engaged in other guard-type activities. 547 F.Supp. at 574. Defendant contests this finding, arguing that at

Dachau he was in charge of a platoon of military recruits who did not have to do guard duty. There is substantial evidence in the record, however, to support the finding that the recruits were trained for both military and guard duty, and kept on reserve in case they were needed to do guard duty or maintain order in the camp.

The district court's opinion contains a succinct summary of defendant's visa and citizenship applications, 547 F.Supp. at 572-573 (footnote omitted):

> On December 3, 1956, the defendant filed an "Application for Immigrant Visa and Alien Registration" (Form FS-2566a) with the United States Consular Office in Hamburg, Germany. In response to Question 26 on the application, requesting the applicant to state his places of previous residence, the defendant answered:
>
> > "Birth-1911, Dresden, Germany;
> > 1911-1934, Leipzig, Germany;
> > 1934-1939, German Waffen SS;
> > 1939-1945, Waffen SS during the war,..."
>
> No mention was made on Schellong's application of his two years of residence at the Sachsenburg Concentration Camp, or of his three years of residence at Dachau.
>
> On January 24, 1957, the defendant was granted a visa to enter the United States. The defendant entered the United States on or about February 23, 1957, and he has resided in this country ever since that time.
>
> On or about January 29, 1962, the defendant filed an "Application to File Petition for Naturalization" (INS Form N-400) to the Immigration and Naturalization Service. The defendant signed

the application on April 16, 1962. In response to Question 7 on the application, requesting the applicant to "[l]ist each organization, association, fund, foundation, club or society in the United States or in any other place that you have been a member of at any time, and the dates of membership in each," the defendant answered:

Christlicher Verein Junger Maenner [Church organization]	1920-1927
Leipziger Ballspiel club [Soccer club]	1926-1932
National Sozialistische Arbeiter Partie [Nazi Party]	1932-1945
Allgemeine SS [ ] [elite corps]	1934-1934
Waffen SS [ ]	1934-1945
Member of the Church of St. Luke [No others]	1957-Date

[The five items in brackets may have been written on the form by the immigration examiner.] No mention was made on Schellong's application of his association with the storm troopers in 1932, or with the SS Sonderkommando "Sachsen," the SS Wachverbande "Sachsen, or with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberbayern") while at Dachau.

On or about April 16, 1962, in connection with the processing of the defendant's application to file a petition for naturalization, the naturalization examiner, Frank M. Siracusa, now Judge of the Cook County Circuit Court, directed the defendant to provide a sworn written statement concerning certain information on his application. Although the request for a statement was not in writing, and Judge Siracusa was unable to recall the precise wording of his question(s) to Scheliong, the defendant's response indicates that the question concerned his activities between 1934 and 1939. Schellong wrote:

> "In the years 1927-1933: the economy of Germany went more and more down. The most of the people were out of work. There were only 2 partys which could come on the power: the Communist party and the N.S.D.A.P. I decided with millions of others for the N.S.D.A.P. I do not believe in the supreme blood of the German race.
> "The Allgemeine SS were a part organization of the N.S.D.A.P. There member had to march and to protect the speaker by the vote campaign. Because I was strong and healthy they asked me to join and I did. I hath no rang [sic: rank].
> "The Waffen SS was a part of the German Army. I like to be soldier and I signed in 1934. I became in all the years in peace and wartime Lt. Colonel. I was highest decorated. I fought only in East against Russia. I had never to do any service in an concentration camp and never arrest one man in this matter. I was only soldier.

* * * * *

> On July 17, 1962, the District Court for the Northern District of Illinois, acting on this petition, granted the defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 8465738.

I. Insufficiency of the evidence

Defendant argues that the government has failed to show willful misrepresentation or concealment on the visa application, the petition for naturalization, or the supplemental statement by clear, unequivocal and convincing evidence. Fedorenko v. United States, 449 U.S. 490, 505, 101 S.Ct. 737, 746-47, 66 L.Ed.2d 686; Chaunt v. United States, 364 U.S. 350, 353, 81 S.Ct. 147, 149-50, 5 L.Ed.2d 120. On the visa application, when asked to list residences, defendant listed "German Waffen SS" from 1934-1939, and "Waffen SS" from 1939-1945. Defendant failed to list Sachsenburg or Dachau as residences even though he lived at those locations for a total of five years. The government's expert, Dr. Sydnor, testified that the Waffen SS did not exist before 1939, and that consequently, listing "German Waffen SS" as a residence from 1934-1939 was not only not responsive to the question, but was also an impossibility. Defendant responds by claiming that the use of the "Waffen SS" to mean "armed" SS was common before 1939, even though the Waffen SS was not formally designated as such until 1939. Defendant supports this theory with testimony from his wife, and by introducing an evaluation of Schellong written in 1940 and referring to defendant as joining the Waffen SS in 1934. The district court gave little weight to this evidence.

If this case centered only around the visa application, we would be reluctant to uphold a finding of willful concealment or misrepresentation. The testimony of government witness L. Donald Junior, a former consular official, indicates that the visa application itself was very limited in space; the applicant's answers would be expanded on the supplemental questionnaire which was also required and in the face-to-face interview. Yet no supplemental questionnaire was introduced into evidence in this case, and this Court can only hypothesize as to whether or not Schellong was asked about his Waffen SS service, as the government claims he must have been, and whether or not he clarified or expanded his answer. For all we know at this point, Schellong might have entered "Waffen SS" as a form of shorthand for his residences, fully intending to clarify the answer if given the opportunity to do so.

The visa application is not, however, the only alleged instance of willful misrepresentation or concealment. Six years later defendant was asked on the naturalization petition to list all the organizations and clubs to which he belonged. He failed to list his SA membership in 1932, claiming a lapse of memory, though he did remember to list his church membership from 1920-1927, and his membership in a soccer club from 1926-1932. He again listed Waffen SS, but this time from 1934-1945 rather than dividing it up as in his visa application, into "German Waffen SS" from 1934-1939, and "Waffen SS" from 1939-1945. Defendant omitted his association with the *SS Sonderkommando* "*Sachsen*," the *SS Wachverbande* "*Sachsen*," the *SS Totenkopfverbande* "*Sachsen*," and the *SS Totenkopfverbande* "*Oberbayern*". There were apparently no space limitations on the naturalization petition that could justify using "Waffen SS" as a shorthand notation. In addition, even if the term "Waffen SS" were used informally during that period-a finding the district court specifically rejected-the evidence shows that on a 1936 curriculum vitae prepared by defendant himself, he listed his organizational affiliations by individual name rather than collectively as Waffen SS. Finally, we know that defendant was given the opportunity to clarify or expand his answer in 1962 because the naturalization examiner asked him to provide a supplemental statement. Rather than clarifying the use of the term "Waffen SS," defendant erroneously stated that it was part of the

German Army, "thus drawing attention away from his connection with the concentration camps." 547 F.Supp. at 576.

Defendant's further remark on the supplemental statement-"I had never to do any service in an concentration camp"-is by far the most damning. The evidence showed that he was a trainer and supervisor of concentration camp guards. Defendant argues that he never participated in supervising or punishing the camp prisoners; that he was not part of the camp commandant's staff; which was responsible for the daily routine of the prisoner's lives, but was only part of the external guard; that in fact he never "entered" a concentration camp. The government agrees there is no evidence that defendant himself punished any prisoners, though he did check on a prisoner held in solitary confinement at Sachsenburg at least once. The government also agrees that defendant was not part of the commandant's staff, and that he was responsible for prisoners only in that he was to prevent their escape, both from the camp and from outside work sites to which they were escorted. But defendant is playing a semantics game in arguing that he never served "in" a concentration camp but merely served "at" Sachsenburg and Dachau. Clearly, the district court did not believe that Schellong was capable of making such a fine distinction in 1962. Even if such a distinction were plausible, it would be exceedingly difficult to make in the case of Sachsenburg, which was a fenceless camp, consisting of one large building housing both prisoners and guards in separate sections. In light of these facts, the district court did not err in finding willful misrepresentation or concealment.

Defendant also challenges the sufficiency of the evidence on the issue of materiality by challenging the hypothetical questions asked of the government witnesses. Frank Siracusa, the naturalization examiner who reviewed defendant's petition and presently Judge of the Circuit Court of Cook County, Illinois, was asked whether he would have granted it based on the following facts: defendant failed to mention he had served as a guard at Sachsenburg and Dachau; defendant was assigned regularly on a rotating basis as concentration camp Security Officer; he supervised SS guards, posted guards, checked guard posts, ordered guards to shoot to kill escaping prisoners; and at Sachsenburg he commanded a platoon of guards who performed regular services at the camp, accompanying prisoners to their work sites and overseeing them during their daily routine (Tr. 41-42). Judge Siracusa responded that he would have denied the petition based on those facts (Tr. 43). Anthony Petrone, the supervisory naturalization examiner on Mr. Schellong's petition, was asked a similar question and gave a similar answer (Tr. 63-65). Immigration Judge Petrone was also asked what he would have done if he learned that an applicant had participated in the Nazi program of religious and political persecution during the war, and he responded that he would have continued the case pending further investigation (Tr. 66-67). Finally, Mr. Junior, a vice consul with the State Department in Hamburg, Germany in 1956,(1) was asked a question similar to that asked of Judge Siracusa, but embellished with some additional facts: the applicant voluntarily joined the SS Death's Head division; prisoners were subjected to beatings by SS guards, whippings and solitary confinement; and the applicant had trained voluntary recruits in the ideology of the Nazi regime (Tr. 92-93). The

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1. Defendant filed his visa application in 1956 in Hamburg but before a different consular officer.

witness responded that he would have denied the visa (Tr. 94).

Some aspects of the hypothetical questions were clearly improper. For example, Mr. Junior was asked what he would have done if he had known that the guards under the applicant's supervision beat prisoners, whipped them and put them in solitary confinement. There was no evidence in the record that defendant's guards had control over punishment such as solitary confinement. In addition, a question directed to Judge Siracusa implied that defendant's duties as Security Officer were performed both at Dachau and at Sachsenburg, while the evidence indicates that he served on a rotating basis as camp Security Officer only at Sachsenburg. Nonetheless, the district judge made clear that defense counsel was to call to his attention at the end of the trial the failure of the government to introduce into evidence facts necessary to sustain the hypotheticals (Tr. 94). The district judge himself was well aware of the limitations of the government's evidence, for when the government argued in closing that the defendant "participated" in the Nazi program of persecution, the judge noted that there was no evidence implicating defendant in any specific incident (Tr. 532-533). But there were sufficient facts introduced into evidence to show that if the visa examiner or the naturalization examiners had been aware of defendant's role at Sachsenburg as a trainer and supervisor of guards, and as a rotating Security Officer and Officer on Reserve; and of his role at Dachau as a trainer of troops held on reserve for guard duty; and as a member of the SS Death's Head Units, they would have either denied his visa application and naturalization petition (Tr. 43, 65, 94), Fedorenko v. United States, 449 U.S. at 514-516, 101 S.Ct. at 751-52, or continued them pending a more detailed investigation (Tr. 67), "possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt* v. *United States*, 364 U.S. 350, 355, 81 S.Ct. 147, 150-51, L.Ed.2d 120; *United States* v. *Fedorenko*, 597 F.2d 9446, 951 (5th Cir.1979), affirmed without affirming or denying this particular aspect of materiality, 449 U.S. at 518 n. 440, 101 S..Ct. at 753 n. 40.

II. Discovery

The government took several videotaped depositions in California and Europe. Defendant's counsel did not attend them, and consequently had no opportunity to cross-examine those witnesses whose deposition testimony was introduced at trial. Although the government offered to pay all travel expenses plus a per diem for food and lodging, defendant's retained counsel demanded attorney's fees, relying on Local Rule 4 of the Northern District of Illinois, which provides that the court may, in its discretion, condition a discovery order on payment of reasonable attorney's fees. Counsel argued that he was entitled to fees because he had "more pressing obligations" in Chicago, and if he stayed in Chicago instead of attending the depositions he could make $600 during one week (Tr. Nov. 12, 1981 at 16). In addition, counsel claimed his client was indigent despite a $4,000 retainer and a fee agreement for $90 an hour. As pointed out by the government before the district court, defendant's income statement showed interest income without revealing the underlying assets and was thus incomplete. Defendant never requested appointed counsel. In light of these facts, we do not think the district court abused its discretion in denying fees in this case. See also *Cassata* v. *Federal Savings and Loan Insur. Corp.*, 445 F.2d 122, 126 (7th Cir.1971), interpreting *North Atlantic & Gulf S.S. Co.* v. *United States*, 209 F.2d 487 (2d Cir.1954), relied on by defendant, as allowing attorney's fees in connection with a deposition to be assessed against the United States based on the fact that the United States agreed to the condition. Despite the fact that defendant chose not to attend the depositions, the district court granted him leave to object during the replay of the videotapes. It should be noted that the district court did not rely on the depositions to any great extent in its fact-finding.

Defendant raises numerous other objections, all of which are meritless. He argues that government witnesses Immigration Judge Petrone and L. Donald Junior were presented as experts but were named only after the close of discovery. The governement's only expert, however, was Dr. Sydnor, and defendant fails to mention that none of his interrogtories ever sought the names of the government's trial witnesses. Both Judge Petrone and Mr. Junior were listed on the pretrial order, and defendant did not object to either of them before trial (Tr. 60, 72).

Defendant also complains about having insufficient time to depose the government's expert, Dr. Sydnor, and insufficient time and money to translate all the government's documents. Defendant thus moved to extend discovery to the year 1999 A.D. Needless to say, the motion was denied. The government provided translations for most of the documents handed over in discovery and gave defendant ample time to depose its expert. The district court did not abuse its discretion in closing discovery.

III. Jury trial

Defendant argues that he is entitled to a trial by jury. This Court declined to reconsider that issue in United States v. Walus, 616 F..2d 283, 304 n. 53 (7th Cir. 1980), and we decline to do so now.

We remain bound by the Supreme Court's holding in *Luria* v. *United States*, 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101, that there is no right to a jury trial in a denaturalization proceeding.

Defendant argues that there are alternative constitutional bases for a jury trial, and that *Luria* only decided the Seventh Amendment issue. He argues that Article III and the Sixth Amendment provide defendant with the basis for a jury trial in a denaturalization proceeding. But a denaturalization suit has never been considered to be a criminal prosecution; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 11444, 83 S.Ct. 554, 9 L.Ed.2d 644, does not mandate a contrary result. In that case, the Court considered a statute which provided for automatic forfeiture of citzenship as a penalty for leaving the United States to avoid the draft. Because the loss of citizenship was intended as a penal saction, the accused was entitled to a criminal trial with all its incidents including trial by jury. A denaturalization proceeding such as this does not entitle a defendant to all the incidents of a criminal trial. Rather, it is well established that such a proceeding is civil in nature. *Schneiderman* v. *United States*, 320 U.S. 118, 160, 63 S.Ct. 1333, 1353, 87 L.Ed.. 1796; *United States* v. *Minerich*, 250 F.2d 721, 726 (7th Cir.1957). The fact that loss of citizenship in *Mendoza-Martinez*, supra, was intended as a penal sanction explains why the defendant in that case, a native-born American, was entitled to a jury trial; defendant's equal protection argument, based on the difference in treatment between a native-born American and a naturalized citizen, is therefore without merit. So too is defendant's final argument, that the due process clause requires a jury trial in this case. *Mathews* v. *Eldridge*, 4424 U.S. 319, 96 S.Ct. 893, 447 L.Ed.2d 18. Though revocation of citizenship is a severe sanction, due process was satisfied by a fair trial before an impartial decision-maker.

The judgment of the district court is affirmed.

UNITED STATES of America, Plaintiff,
v.
Conrad Heinrich SCHELLONG,
Defendant,

No. 81 C 1478.

United States District Court,
N. D. Illinois, E. D.

Sept. 9, 1982.

MEMORANDUM OPINION AND ORDER

DECKER, District Judge.

Plaintiff, the United States of America, brought this action pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. Sec. 1451(a), to revoke the citizenship of the defendant, Conrad Heinrich Schellong, on the grounds that the defendant procured his citizenship illegally and by concealment or willful misrepresentation of a material fact. The government contends that the defendant, in applying for an immigration visa and later permanent citizenship, willfully concealed or misrepresented his membership in certain Nazi organizations and his involvement with the concentration camps in Nazi Germany during the 1930's. Beginning on May 26, 1982, this court heard six days of testimony concerning the government's claims and Schellong's defenses. This court has reviewed the transcript of that trial and the relevant exhibits, as well as the parties' post-trial memoranda, and hereby enters the following findings of fact and conclusions of law.

I. Factual Background.

Defendant Conrad Schellong was born in Dresden, Germany, in 1910. In the Spring of 1932, as Germany's economy was failing and Hitler was coming into power, the defendant became a member of Germany's Sturmabteilungen, a paramilitary unit of the Nazi Party, more commonly known as the Storm Troopers or "brown shirts." The duties of the storm troopers were generally to guard Nazi meeting halls and to disrupt meetings of opposing political parties. Although the storm troopers are now known to have also participated in numerous acts of street violence and pogroms against the Jewish people during the late 1930's, the record in this case indicates that Schellong remained a member of the group only until November, 1932, and that his sole activities with the organization consisted of his participation in two demonstrations or marches in support of the Nazi Party.

In December, 1932, the defendant joined both the German Nazi Party (Nationalsozialistische Deutsche Arbeiter Partie) and the Schutzstaffel, an organization more commonly known as the "Allgemeine SS" or simply "SS." For purposes of this litigation, it need be noted only briefly that the Nazi Party espoused a philosophy of racial purity, racial superiority, and intolerance toward political and philosophical opposition. The principal function of the Allgemeine SS in the early 1930's was to guard Nazi Party speakers and to carry out party intelligence, although the SS gradually assumed the additional responsibility of the administration and guarding of the concentration camps. The SS was, at all relevant times, distinct from the Wehrmacht, or German armed forces, which were composed of Germany's army, air force, and navy. According to the evidence, the defendant remained a member of the Allgemeine SS until 1934, and was a member of the Nazi Party until the fall of Hitler's Germany in 1945.

Of particular importance to this litigation are the defendant's activities between 1934 and 1939. In February 1934, the defendant joined the *SS Sonderkommando "Sachsen"* ("SS Special Commando 'Sachsen'"), an organization stationed at the Sachsenburg Concentration Camp in Saxony, Germany.(1) Upon completion of basic training, the men of the SS Special Commando "Sachsen" were assigned to guard the prisoners and prevent escapes from the Sachsenburg Concentration Camp. The SS Special Commando "Sachsen" were considered *wach truppe*, or "watch troops," distinct from the *Abteilung Drei*, or camp commandant's staff, which was responsible for the daily operation of the camp, prisoners' work schedules, and punishment.

The defendant testified that he began his assignment at Sachsenburg in October 1934 as a corporal, and that his responsibilities included the supervision of a platoon of guards and also service as a Security Officer and a Reserve (or "Alert") Officer on a rotating basis with other platoon leaders. During the defendant's rotation as

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1. According to the testimony, the Sachsenburg Concentration Camp consisted of one large building, which housed both prisoners and guards in separate sections, a guard house, a medical building, work sites, and an assembly area. The camp was surrounded by a river on one side, and steep hills in the rear. During the time the defendant was stationed at Sachsenburg, the camp held approximately 400-500 prisoners, including political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, and Jews. It is uncontested that the prisoners at Sachsenburg were not being held for committing any criminal acts, but rather for the perceived threat which they represented to the success of the Nazi Party.

Security Officer, he was in charge of security for the entire camp for twenty-four hour periods. The SS Special Commando "Sachsen" was renamed the SS Wachverbande "Sachsen" ("SS Guard Unit) in late 1934, and renamed again as the SS Totenkopfverbande "Sachsen" ("SS Death's Head Unit 'Sachsen'") in April 1936. The defendant's duties during that period, however, did not change significantly.

In early 1936, the defendant was assigned for approximately four months to the 11th Company of the SS Guard Unit "Oberbayern" at Germany's Dachau Concentration Camp, near Dachau, Germany, where he participated in a platoon leaders training course. Upon his return to Sachsenburg in late April 1936, the defendant was promoted to the rank of Second Lieutenant, and given command over approximately 30 of the 100 to 120 SS men guarding the camp. The guards under Schellong's supervision served as camp guards approximately every fourth or fifth day, supervising the prisoners at the work sites and performing other guard duties to prevent escapes. Guards were instructed to keep alert and were told to warn and then shoot to kill any prisoner attempting to escape.

Although it appears that the SS guards were not directly responsible for the punishment of the camp prisoners and their onerous work schedules, the guards were nevertheless aware of the prisoners' cruel treatment. Schellong testified that he witnessed at least two floggings of prisoners while at Sachsenburg, and that he personally took turns checking on prisoners being held in solitary confinement at the camp. Furthermore, the guards were aware of the work detail of hard labor assigned to the prisoners, including shoveling sewage, breaking rocks, and hauling stones.

In late November 1936, Schellong was transferred to the Dachau Concentration Camp, where he was assigned to the 7th Death's Head Company of the Death's Head Unit "Oberbayern."(2) Between December 1936 and December 1939, when Schellong left Dachau, the defendant commanded the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company, all of which were rifle companies that performed guard duty at the camp. The defendant's responsibilities at Dachau included training new recruits, preparation of the duty roster of guards, and the supervision of the guards under his command. Similar to the operation at Sachsenburg, Schellong's men performed their guard duties on a rotating basis, manning the watchtower, guarding the gate, and supervising the forced labor detail. The defendant was promoted twice during his term at Dachau, to First Lieutenant in April 1937, and to Captain in August 1939.

Although there was some testimony that SS guards occasionally participated in the punishment of prisoners at Dachau, and also some testimony that the guards in at least one of Schellong's units were reputed to be among the most abusive guards

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2. Witnesses testified that the camp at Dachau was much larger than Sachsenburg, accommodating between 4,000 and 14,000 prisoners during the time that Schellong was stationed there. The camp itself contained a protective arrest area, shops, barracks for the local SS administration, SS guard barracks, officers' quarters and an officers' casino. Unlike Sachsenburg, guards and prisoners were not housed in the same building at Dachau. Dachau's prisoners consisted largely of Jehovah's Witnesses, Jews, Protestant and Catholic clergy, and other opponents of the Nazi Party.

in the camp, no evidence was presented that Schellong personally beat or physically abused any prisoner at Dachau. Schellong admitted, however, that he was aware of the inhuman treatment of the prisoners he guarded-the forced labor, the living conditions, and the punishment. In a volunteered understatement, the defendant testified that he knew that Dachau was not a "nice place to be," and that the punishment of prisoners and their living and work conditions were "not a nice subject."

In late 1939, as the German war effort mounted, the prisoners at the Dachau Concentration Camp were temporarily reassigned to other camps so that Dachau could be used for actual military training of the SS Death's Head Units. At that time, the various Death's Head Units were consolidated into a single military organization and became, in effect, a distinct and separate branch of the German armed forces. The name given to that military organization was Waffen SS, which translated literally meant "armed SS." Prior to 1939, no organization by that name existed. At no time was the Waffen SS considered a part of the German Army.

The record shows that the defendant served with the 6th SS Death's Head Regiment of the Waffen SS in Norway until 1941, when he was transferred to the eastern front of the remainder of the war. Schellong in November 1942 was promoted to Major of his unit in the Waffen SS, and by the end of the war, held the rank of Lieutenant Colonel.

II. The Defendant's Visa and Citizenship Applications.

On December 3, 1956, the defendant filed an "Application for Immigrant Visa and Alien Registration" (Form FS-256a) with the United States

Consular Office in Hamburg, Germany. In response to Question 26 on the application, requesting the applicant to state his places of previous residence, the defendant answered:

> "Birth-1911, Dresden, Germany; 1911-1934, Leipzig, Germany; 1934-1939, German Waffen SS; 1939-1945, Waffen SS during the war,..."

No mention was made on Schellong's application of his two years of residence at the Sachsenburg Concentration Camp, or of his three years of residence at Dachau.

On January 24, 1957, the defendant was granted a visa to enter the United States. The defendant entered the United States on or about February 23, 1957, and he has resided in this country ever since that time.

On or about January 29, 1962, the defendant filed an "Application to File Petition for Naturalization" (INS Form N-400) to the Immigration and Naturalization Service. The defendant signed the application on April 116, 1962. In response to Question 7 on the application, requesting the applicant to "[l]ist each organization, association, fund, foundation, club or society in the United States or in any other place that you have been a member of at any time, and the dates of membership in each," the defendant answered:

Christlicher Verein junger Maenner [Church organization]	1920-1927
Leipziger Ballspiel club [Soccer club]	1926-1932
National Sozialistische Arbeiter Partie [Nazi Party]	1932-1945

Allgemeine SS	[ ]	1932-1934
	elite corps	
Waffen SS	[ ]	1934-1945
Member of the Church of St. Luke		1957-Date

[No others] (3)

No mention was made on Schellong's application of his association with the storm troopers in 1932, or with the SS Sonderkommando "Sachsen," the SS Wachverbande "Sachsen," or with the SS Totenkopfverbande "Sachsen," the Death's Head Unit with which he served for over three years. In addition, no mention was made as to the defendant's association with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberbayern") while at Dachau.

On or about April 16, 1962, in connection with the processing of the defendant's application to file a petition for naturalization, the naturalization examiner, Frank M. Siracusa, now-Judge of the Cook County Circuit Court, directed the defendant to provide a sworn written statement concerning certain information on his application. Although the request for a statement was not in writing, and Judge Siracusa was unable to recall the precise wording of his question(s) to Schellong, the defendant's response indicates that the question concerned his activities between 1934 and 1939. Schellong wrote:

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3. The bracketed materials above were written, not typed, on the defendant's application, and it appears that they may have been written on the form by the Immigration Examiner during his interview with the defendant.

> "In the years 1927-1933: the economy of Germany went more and more down. The most of the people were out of work. There were only 2 partys which could come on the power: the Communist party and the N.S.D.A.P. I decided with millions of others for the N.S.D.A.P. I do not believe in the supreme blood of the German race.
>
> "The Allgemeine SS were a part organization of the N.S..D.A.P. There member had to march and to protect the speaker by the vote campaign. Because I was strong and healthy they asked me to join and I did. I hath no rang [sic: rank]. "The Waffen SS was a part of the German Army. I like to be soldier and I signed in 19344. I became in all the years in peace and wartime Lt. Colonel. I was highest decorated. I fought only in East against Russia. I had never to do any service in an concentration camp and never arrest one man in this matter. I was only soldier.

* * * *

On July 17, 1962, the District Court for the Northern District of Illinois, acting on this petition, granted the defendant's Petition for Naturalization and issued to him Certificate of Naturalization No. 8465738.

III. Discussion.

[1] Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1182(a)(19) provides that any alien who has procured a visa "by fraud, or by willfully misrepresenting a material fact" shall be ineligible to obtain a visa and shall be excluded from admission to the United States. Correspondingly, Section 340(a) of the Act, 8 U.S.C. Sec. 1451(a), provides that a certificate of naturalization will be revoked and set aside where it is later found to have been "illegally procured" or "procured by concealment of a material fact or by

willful misrepresentation." See, e.g., Fedorenko v. United States, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). In addition, the Act states that persons who have given false testimony for the purpose of obtaining benefits under the Act lack, as a matter of law, the good moral character required for obtaining citizenship. 8 U.S.C. Sec. 1101(f)(6). To sustain its burden of proof, the government must establish the facts justifying revocation by "clear, unequivocal, and convincing evidence." Fedorenko v. United States, 449 U.S. at 505, 101 S.Ct. at 747. As the Supreme Court has noted, "[a]ny less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." Id. at 505-506, 101 S.Ct. at 747.

A. Concealment or Misrepresentation.

In this case, the government claims that Scheilong's use of the term "Waffen SS" in both his visa application and his application for a naturalization petition covering the period from 1934-1939 was willfully false and that he used that term for the purpose of concealing his involvement with the German concentration camps. Furthermore, the government contends that the defendant's supplemental statements that the Waffen SS was "a part of the German Army," and that he "had never to do any service in any concentration camp," were also false, and were also willfully made for the purpose of concealing his concentration camp activities. Such misstatements, the government argues, were material. According to the government, had either the consular official who processed the defendant's visa application or the immigration examiner who processed the defendant's application for a naturalization petition known of the true extent of the defendant's involvement in the SS Death's Head Unit, including his involvement with the concentration camps, his visa and citizenship applications would never have been approved. (4)

It is the defendant's position that he did not conceal or misrepresent his activities in the Sachsenburg or Dachau concentration camps, or his membership in the Ss Death's Head organization. The defendant maintains that he never really served in a concentration camp, but was only a trainer of guard troops at the camps. The defendant denies that he ever actually served as a camp guard, and adamantly states that he never struck or otherwise injured a prisoner. Concerning his use of the term "Waffen SS" instead of Death's Head Unit as his organizational affiliation from 1934-1939, and his use of "Waffen SS" as his residence during that period instead of the Sachsenburg and Dachau concentration camps where he was actually residing, the defendant testified that although the military organization known as the Waffen SS did not actually come into existence until 1939, long before that time the term was used as an informal designation for all "armed" SS personnel. Therefore, he claims that his designation of the Waffen SS for both his residence and also as his only organizational affiliation (outside of the Nazi Party), reflected a use of common parlance for the time, and not an intentional misrepresentation or concealment of his Death's Head activities in the camps.

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4. The government has also raised several alternative grounds for revocation based on the defendant's participation in acts of prosecution and immorality. The court need not address those arguments, however, if it finds that the defendant willfully concealed or misrepresented material facts on either his visa or citizenship application.

The court, having heard all of the evidence presented and after having had the opportunity to review and assess the credibility of the various witnesses, particularly the testimony of the defendant, the immigration examiner Siracusa, and the government's expert witness Dr. Charles Sydnor, finds by clear, convincing and unequivocal evidence that the defendant willfully consealed and misrepresented material facts in his visa and citizenship applications which require that his naturalization certificate be revoked.

The evidence presented by the government conclusively established that during the period from approximately 1934-1936, defendant Schellong resided at the Sachsenburg Concentration Camp in Saxony, Germany, and that while he was there, he was a member of the SS Death's Head Unit "Sachsen." The evidence further established that while he was at Sachsenburg, the defendant's activities included the training of concentration camp guards, and service as the camp Security Officer and as a Reserve Officer on a rotating basis. The record also shows that incident to the defendant's duties as a Death's Head officer at Sachsenburg, the defendant instructed the guards under his supervision to prevent escapes from the camp, and told the guards that if a prisoner were seen escaping, the guard was to warn the prisoner and then shoot to kill him. Furthermore, the court finds that incident to the defendant's duties at Sachsenburg, the defendant was responsible for checking on a prisoner, Erich Jacoby, who was being held in solitary confinement, and that the defendant personally witnessed two floggings while he was at the camp. Finally, the court finds that the defendant was aware of the regime of hard labor and punishment imposed upon the prisoners at Sachsenburg.

The court also finds, based upon all of the evidence presented at trial, that the defendant was stationed at the Dachau Concentration Camp from approximately November 1936-1939, during which time he served as a member of the SS Death's Head Unit at the camp, commanding the Second Platoon of the 7th Death's Head Company, the 11th Death's Head Company, and the 9th Death's Head Company. With respect to the defendant's service at Dachau, the court finds that although the defendant was not housed in the same building that housed the prisoners as he had been at Sachsenburg, the defendant's activities with respect to the concentration camp were significant. The evidence convincingly established that at Dachau, the defendant supervised guard troops who watched the prisoners on work detail, manned the watchtowers to prevent escapes, and engaged in other guard-type activities. The evidence also established that the defendant was aware of the forced labor assignments at the camp, ranging from breaking rocks to hauling raw sewage, and that the defendant was also aware of the punishment inflicted upon the prisoners by the members of the commandant's staff and also by some guards.

In sum, the court finds that the defendant misrepresented his residence on his visa application by deleting any mention of his residence at Sachsenburg and Dachau. Furthermore, the court finds that the defendant misrepresented his organizational affiliations on his application for a naturalization petition by deleting any mention of his affiliation with the SS Sonderkommando "Sachsen," the SS Wachverbande "Sachsen," or particularly the SS Totenkopfverbande "Sachsen" (or Death's Head"). Defendant also failed to include his affiliation with the SS Totenkopfverbande "Oberbayern" (SS Death's Head Unit "Oberbayern") while at Dachau. Finally, the court finds that the defendant misrepresented certain information on his supplemental statement in support of his naturalization petition, by stating that the Waffen SS, a term which he had used, was a branch of the German Army and that he had not served in any concentration camp. All of the above misrepresentations, the court finds, alternatively represent statements which conceal the fact of the defendant's membership in the SS Death's Head and his service supervising guards in the Sachsenburg and Dachau concentration camps.

B. Materiality.

The Supreme Court has held that for purposes of interpreting the immigration laws, a misrepresentation "must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." Fedorenko v. United States, 449 U.S. at 509, 101 S.Ct. at 749. A second, more liberal test for determining materiality in naturalization applications not relied upon by the Supreme Court in Fedorenko was expressed in Chaunt v. United States, 364 U.S. 350, 355, 81 S.Ct. 147, 150, 5 L.Ed.2d 120 (1960). There, the Court held that the government must show either:

> "(1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."

In this case, the court finds that had Schellong not concealed his correct residences on his visa application in 1956, he would have been considered ineligible to receive an immigration visa by virtue of his service at Sachsenburg and Dachau. Lewis D. Junior, who served in the Consular Office at Hamburg for a three-year period following early 1956, testified that visa applications were routinely denied whenever they disclosed service in a concentration camp and that defendant would have been rejected if his documentation showed that he had been involved in a Ss Death's Head division at a concentration camp. As the Court in Fedorenko, supra, pointed out, "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." 449 U.S. at 509, 101 S.Ct.. at 749.

In addition, the court finds that the defendant's misrepresentations on his application for a petition of naturalization were material. There, in response to a question requesting all of his organizational affiliations, the defendant failed to list his membership in the SS Death's Head Unit, an answer which would have prompted further investigation "possibly leading to the discovery of other facts warranting denial of citizenship." Chaunt, supra. The materiality of the defendant's concealment on his supplemental statement is also evident. Had the defendant properly stated that the Waffen SS (which he had listed as one of his only organizational affiliations) was never considered a part of the German Army, and that his assignments were at two German concentration camps, the court is convinced that further investigation would have taken place, possibly leading to the discovery of other facts warranting denial of Schellong's citizenship petition. See Chaunt. The effect of these misstatements and omissions was highlighted when the following hypothetical question was asked of the defendant's immigration examiner:

> MS. WAWZENSKI; If the misrepresentation had to do with failing to disclose the service at these camps, and that he rose to the level of a captain in those camps, that he supervised

> guards who dealt with forced labor, ordered those guards to shoot to kill anyone who escaped from the camp. If that was the misrepresentation that had been made, what would be your conclusion?
>
> . . . .
>
> THE WITNESS: My conclusion would be to deny the application.

Although the court is not bound to accept the witness' testimony as conclusive, based upon all of the unrebutted testimony concerning the extent of the defendant's involvement in camp activities, the court concludes that the defendant's misrepresentations and omissions were material and if true and complete answers had been given, defendant would not have received his citizenship.

C. Intent.

The parties have agreed that only willful misrepresentations or willful concealment of material facts is actionable under the immigration laws at issue here. See 8 U.S.C. Sec. 1451(a). In this case, the court finds that the misrepresentations and concealment were willful. It is significant that from the time defendant applied for his visa in 1956 until he filed his supplemental affidavit on July 17, 1962, in support of his petition for naturalization, he carefully avoided any references to his residence and his activities at Sachsenburg and Dachau. His excuse for omitting this damaging information that he used the term Waffen SS to cover his army service during this period.

Although the defendant testified in his own behalf concerning the common use of the term Waffen SS as an umbrella term for all armed Ss personnel, he failed to introduce any evidence of consequence supporting such a finding. The only evidence offered by the defendant was an officer's evaluation of Schellong prepared in 1940. In that evaluation, the officer listed Schellong as having been with the Waffen SS since 1934. That limited evidence, however, is not seriously probative of any recognized informal acceptance of the term prior to 1940, particularly in light of Dr. Sydnor's testimony that the term was not used. In addition, the government introduced a curriculum vitae prepared by the defendant himself in 1936, in which he lists his organizational affiliations by individual name, rather than collectively as Waffen SS. In fact, Schellong's curriculum vitae makes no mention of the term Waffen SS. Finally, as evidence of willfulness, the court notes that when the defendant was given an opportunity in 1962 to clarify just what he meant by the term Waffen SS, he erroneously stated that it was a part of the German Army, thus drawing attention away from his connection with the concentration camps. Given the widely recognized consequences to an immigrant who had been linked to the concentration camps, on the basis of the testimony presented, defendant had ample reasons to hide his guard service during this period. The court concludes that the government has proven by clear and convincing evidence that the defendant's misrepresentations were willful.

IV. Equitable Defenses.

The defendant has raised a number of equitable defenses, claiming that the representations which he made on his application, including his admitted affiliation with the Nazi Party, should have been sufficient to alert the government to his SS activities as early as 1956 or 1962, and that the government's failure to act on that information until this late date constitutes laches or estoppel, with the same effect as a statute of limitations.

A similar plea was listened to sympathetically by the district judge involved in the appeal in Fedorenko v. United States, 449 U.S. AT 516-18, 101 S..CT. at 752-53. In that case, the district court had ruled that even assuming that petitioner had misrepresented material facts, equitable and mitigating circumstances required that the petitioner be permitted to retain his citizenship. In agreeing with the court of appeals that the trial court possessed no such discretion, Mr. Justice Marshall, writing for the Supreme Court, left no question as to the limited authority of a district judge in denaturalization proceedings:

> "[O]nce a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct. Indeed, contrary to the District Court's suggestion, ... this issue had been settled by prior decisions of this Court.(5) In case after case, we have rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings.... We repeat here what we said in one of these earlier cases:
>
>> 'An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions

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5. For other cases to the same effect as Fedorenko, see also Costello v. United States, 365 U.S. 265, at 281, 81 S..Ct. 534, at 542, 5 L.Ed.2d 551 (1961); Knauer v. United States, 328 U..S. 654, 66 S.Ct. 1304, 90 L.Ed. 1500 (1946); and United States v. Ness, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321 (1917).

specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. United States v. Ginsberg, [243 U.S. 472, at 474-475 [37 S.Ct. 422, at 425, 61 L.Ed. 853](1917).'"

Fedorenko, supra, 449 U.S. at 517-518, 101 S.Ct. at 753 (footnote added).

At the least, Conrad Schellong in applying for his visa and his admission to citizenship was under both a moral and a legal obligation to give truthful and complete answers to the questions posed to him. He failed in this test and thereby obtained a grant of citizenship which would otherwise have been denied him. Having taken this course and having willfully made the material misrepresentations and omissions discussed in this opinion, Schellong himself is responsible for the order which follows:

It is the judgment of this court that this court's order of July 17, 1962, admitting defendant to citizenship, is hereby set aside, and it is further ordered that defendant's Certificate of Naturalization No. 8465738 is hereby cancelled, and that said certificate be surrendered to the United States Attorney for the Northern District of Illinois.

JUDGMENT -- ORAL ARGUMENT

United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

October 15, 1986.

Before
Hon. William J. Bauer, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

CONRAD SCHELLONG,
Petitioner,

No. 85-2430 vs.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petitioner for Review of Order of united States Immigration and Naturalization Service.

This cause was heard on the record from the United States Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the decision of the Board of Immigration Appeals in AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

for the Seventh Circuit

Chicago, Illinois 60604

November 14, 1986.

Before
Hon. William J. Bauer, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

CONRAD SCHELLONG,
Petitioner,

No. 85-2430 vs.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petitioner for Review of Order of United States Immigration and Naturalization Service.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by petitioner, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.